DOCUMENT RESUME

ED 304 651 CG 021 526

TITLE Polygraph Testing in the Private Work Force. Hearings before the Subcommittee on Employment Opportunities of the Committee on Education and Labor. House of Representatives, One Hundredth Congress, First Session (March 5 and April 30).

INSTITUTION Congress of the U.S., Washington, D.C. House Committee on Education and Labor.

PUB DATE 87

NOTE 297p.; Serial No. 100-23.

AVAILABLE FROM Superintendent of Documents, U.S. Government Printing Office, Congressional Sales Office, Washington, DC 20402.

PUB TYPE Legal/Legislative/Regulatory Materials (090)

EDRS PRICE MF01/PC12 Plus Postage.

DESCRIPTORS *Employer Employee Relationship; *Evaluation Methods; Federal Legislation; Hearings; *Polygraphs; *Work Environment

IDENTIFIERS Congress 100th; Proposed Legislation

ABSTRACT

The text of a Congressional hearing regarding the use of lie detector devices, particularly polygraph machines and whether they are accurate in truth and fact detecting in the work place is provided in this document. Special focus is given to the Employee Polygraph Protection Act. Initial statements by Congressmen Matthew G. Martinez, Steve Gunderson, Stewart B. McKinney, and George Darden are presented. Testimony by these witnesses is included: (1) Jon Bauer, staff attorney, Legal Action Center, New York, New York; (2) John F. Beary, III, assistant dean for planning and development, Georgetown University School of Medicine, on behalf of the American Medical Association; (3) Michael Darby, victim, Lawrenceville, Georgia; (4) Joseph Fanning, vice president, Wells Fargo; (5) Robert B. Fitzpatrick, Fitzpatrick & Verstegen, on behalf of the Plaintiff Employment Lawyers Association; (6) Edward S. Katkin, chairman, Department of Psychology, State University of New York at Stoneybrook, on behalf of the American Psychological Association; (7) Nester Macho, consultant for Orkin Pest Control; (8) Steve Markman, Assistant Attorney General, Office of Policy, Department of Justice; (9) Joseph O'Neill, director of police, Conrail, on behalf of the Association of American Railroads; and (10) William J. Scheve, president, American Polygraph Association. Prepared statements of Representative Pat Williams are also included. The appendix includes statements by trade associations, unions, government agencies, and advocacy groups. (ABL)

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POLYGRAPH TESTING IN THE PRIVATE WORK FORCE

ED304651

HEARINGS

BEFORE THE

SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES

OF THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

FIRST SESSION

HEARINGS HELD IN WASHINGTON, DC, ON MARCH 5 AND APRIL 30, 1987

Serial No. 100-23

Printed for the use of the Committee on Education and Labor

CG 021526

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POLYGRAPH TESTING IN THE PRIVATE WORK FORCE

THURSDAY, MARCH 5, 1987

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES,
COMMITTEE ON EDUCATION AND LABOR,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:06 a.m., in room 2261, Rayburn House Office Building, Hon. Matthew G. Martinez presiding.

Members present: Representatives Martinez, Owens, Jontz, Gunderson, and Grandy.

Staff present: Eric Jensen, staff director; Valerie White, legislative assistant; Tammy Harris, clerk; Mark Powden, minority staff director; Mary Gardner, legislative associate director.

Full committee staff present: Don Baker, committee counsel; Carole Stringer, legislative analyst.

Mr. MARTINEZ. The subcommittee will come to order.

Mr. Williams, author of the bill before us today, is here, and on my left is Mr. Henry. Mr. Henry is from Michigan.

Let me first go to my opening statement and then we will get started with the other members and their comments. As the members join us I will introduce them.

Ranking minority member of the committee is Mr. Steve Gunderson. Welcome, Steve.

Mr. GUNDERSON. Thank you, Mr. Chairman.

Mr. MARTINEZ. Mr. Gunderson is from Wisconsin.

The purpose of today's Employment Opportunities Subcommittee hearing is to receive testimony regarding the use of the lie detector devices, particularly polygraph machines and whether they are accurate in truth and fact detecting in the work place. This hearing will focus on H.R. 1212, the Employee Polygraph Protection Act, introduced by Representative Pat Williams of Montana.

The polygraph lie detector is designed to detect truth and dishonesty by measuring the blood pulse, blood pressure and body temperature levels of workers. It is used to pre-screen applicants for employment, for investigation of specific crimes and for random screening and monitoring in the work force.

Many companies hold that the polygraph provides important protection against major property losses. Companies believe that the polygraph is accurate and some rate accuracy as high as 95 percent. But companies also say that they do not base hiring and

firing entirely on these lie detector tests. They use it, rather, as one piece in larger investigations.

There is, however, diverse opinions on whether or not the device can detect truth or dishonesty, or only measure stress levels. As stress can come from any number of sources, including a criminal investigation or false accusations directed against an innocent worker, there is room for doubt as to what extent we can depend on this device for judgments in hiring and firing workers. Several studies by academic and scientific bodies, including the Congressional Office of Technology Assessment, have concluded that the instrument is not a valid indicator of truth and dishonesty. Indeed, the judicial system refuses to allow admission of polygraph examinations as evidence in a court of law.

The question has been raised whether regulation of the polygraph industry through licensing and education requirements for the operators can eliminate abuses of the instrument. Many maintain that polygraphs themselves are inherently flawed as measures of truthfulness. Property loss is most certainly a serious and legitimate problem of businesses. But is it worth the risk of scarring innocent workers and destroying their careers, as well as perhaps of severely affecting morale and individual privacy in the work place?

The questions before us today are critical. Courts are now awarding major damage suits against companies that wrongfully apply or come up with wrong results from a lie detector test. Most large employers still do not use the lie detector, using instead common sense management, background reference checks, and sound auditing practices to detect and deter major company thefts.

Yet for many companies, the problem of property loss is just too large to ignore. The polygraph, they say, is an effective and legitimate means of solving it. Our task here today is to determine whether this is true, and whether it is consistent with our goals of personal rights and liberties, and of creating harmony and enhancing productivity in the work place.

[The prepared statement of Hon. Matthew G. Martinez follows:]

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SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES

OPENING STATEMENT BY
MATTHEW G. MARTINEZ
CHAIRMAN, SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES
HEARING ON THE USE OF POLYGRAPHS BY EMPLOYERS
MARCH 5, 1987

The purpose of today's Employment Opportunities Subcommittee hearing is to receive testimony regarding the use of lie detector devices, particularly polygraph machines, in detecting truth or dishonesty in the workplace. This hearing will focus on H.R. 1212, the Employee Polygraph Protection Act, introduced by Representative Pat Williams of Montana.

The Polygraph lie detector is designed to detect truth and dishonesty by measuring the blood pulse, blood pressure and body temperature levels of workers. It is used to prescreen applicants for employment, for investigation of specific crimes, and for random screening and monitoring of the workforce.

Many companies hold that the polygraph provides important protection against major property losses. This helps to hold down both business costs and consumer prices. Companies believe that the polygraph is accurate, some rating it as high as 95 percent. But companies also say that they do not base hiring and firing entirely on lie detector tests. They use it, rather, as one piece of evidence in larger investigations.

There is, however, diverse opinion on whether or not the device can detect truth or dishonesty, or even measure stress levels. As stress can come from any number of sources, including a criminal investigation or false accusations directed against an innocent worker, there is room for doubt as to what extent we can depend on this device for judgements in hiring and firing workers. Several studies by academic and scientific bodies, including the Congressional Office of Technology Assessment, have concluded that the instrument is not a valid indicator of truth and dishonesty. Indeed, the judicial system refuses to allow the admission of polygraph examinations as evidence in a court of law.

The question has been raised whether regulation of the polygraph industry through licensing and education requirements can eliminate abuses of the instrument. Yet many maintain that polygraphs themselves are inherently flawed as measures of truthfulness. Property loss is most certainly a serious and legitimate problem of businesses. But is it worth the risk of scarring innocent workers and destroying their careers, as well as perhaps severly affecting morale and individual privacy in the workplace?

The questions before us today are critical. Courts are now awarding major damage suits against companies that wrongfully apply or come up with wrong results from lie detector tests. Most large employers still do not use the lie detector, using instead common sense management, background reference checks, and sound auditing practices to detect and deter major company thefts. Yet for many companies, the problem of property loss is just too large to ignore. The polygraph, they say, is an effective and legitimate means of solving it. Our task is to determine whether this is true, and whether it is consistent with our goals of personal rights and liberties, and of creating harmony and enhancing productivity in the workplace.

Mr. MARTINEZ. And with that I would turn to the ranking minority, Mr. Steve Gunderson of Wisconsin.

Mr. GUNDERSON. Thank you, Mr. Chairman. I am going to ask unanimous consent that a comprehensive statement might be made a part of the record——

Mr. MARTINEZ. So ordered.

Mr. GUNDERSON [continuing]. Rather than spend a great deal of time doing that today.

I would point out that this is not a new issue to any of us. We held discussions in this subcommittee and in the full house last session. And I would also point out that anyone who has watched my record knows that I am not the world's strongest advocate for the use of polygraphs. That does not mean that I am likewise at the point to think that we ought to ban it under all circumstances in the private sector and totally allow it under all circumstances in the public sector. I think there is a bit of hypocracy in that particular mentality.

I am more concerned today, to be very honest, Mr. Chairman, with the process than I am with the issue. Regardless of whether one is for or against this regulation, whether one is for or against the concept or whether one believes we ought to just leave legislation as, or the law as it is today, I think this early in the session we ought to make a commitment in this subcommittee that we will give a thorough and full hearing to the issue. Things do change, times change, circumstances change, and I would suggest that, yes, at times even the evidence does change.

I have to tell you in all honesty, Mr. Chairman, I am deeply disappointed to be told that various people who testified last session do not have the right likewise to testify this session. If we are going to be consistent in that type of an attitude, we ought to ask the gentlemen at the table right now to leave because they testified last session as well. And I think in all honesty, Mr. Chairman, if we are going to proceed in fairness and we are going to have a process that can be justified, we ought to commit ourselves at least one more day of hearing where we allow people, both pro and con on this issue to have the opportunity to come testify whether they did or did not testify in the last session.

So I would hope and beseech upon you and Mr. Williams, who has always been noted for his fairness, whether we agree or disagree on an issue, he has always been eminently fair, that we would make sure that the debate on this issue focuses on the polygraph and not on the process. And I am going to request, before we move towards any kind of committee executive action on this legislation that we make sure that people on both sides of the issue have an opportunity to present their case. That is what the whole Congress is all about, that is what the legislative and deliberative process is all about, and I think this committee ought to set that example, especially on an issue which is based on the whole principle of whether or not fairness and justice is at stake.

[The prepared statement of Hon. Steve Gunderson follows:]

STATEMENT BY THE HONORABLE STEVE GUNDERSON
SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES
HEARING TO CONSIDER USE OF THE POLYGRAPH
IN THE PRIVATE SECTOR WORKPLACE
MARCH 5, 1987

Mr. Chairman, during last year's consideration of H.R. 1524, the "Employee Polygraph Protection Act of 1985" I expressed my reservations over providing a Federal ban on all polygraph testing in the private sector workplace. However, the questionable accuracy of the polygraph and its potential for abuse, particularly when used in job applicant and random screening, is an issue of real concern to many of us, and is the reason we are here today.

Unfortunately, polygraph testing can and has in the past resulted in unfair discrimination against honest job applicants and employees. Even under the best of circumstances there is a margin of error which is cause for great concern to those interested in worker rights. However, do we completely ban the use of such a tool when many businesses feel it is extremely valuable in combatting employee theft and crime?

What we need to carefully determine today and during the bill's consideration this year is what the proper role of the Federal government should be in providing protection against polygraph abuses in the workplace? While I am certainly not convinced that the polygraph test is always an accurate, fair method of employee screening -- particularly in its current state, free of any Federal regulation -- is it the proper role of the Federal government to prohibit its use completely within the private sector?

This is a particularly poignant question for businesses in "high risk" industries where theft and employee turnover is high. At a time when losses in the retailing industry alone equal $10 billion per year due to employee theft, it's little wonder that businesses use any tool they can to prevent and protect themselves and consumers from such crimes.

Businesses provide us with many reasons for testing job applicants & current employees through the use of lie detectors. Based on information gained last Congress I have personally come to the conclusion that the most appropriate use of the polygraph for employment purposes is its use as an investigative tool after the commitment of a theft or crime. In such situations, testing should extend to only those who had access or the opportunity of committing the crime. This form of testing would serve as a deterrent to the commission of crime, and would aid in identifying guilty parties once such acts take place.

The bill we are considering today, H.R. 1212 goes far beyond this however. I do question the random use of the polygraph exam for pre-employment screening or for regular testing of current employers with no specific cause. However, if enacted H.R. 1212 would completely ban the use of polygraph testing in the private sector workplace, even as an investigative tool -- and even in those industries at highest risk of employee crime.

While I am certainly aware of and share the concerns that workers face who are subjected to these examinations, should we completely tie the hands of business in using these tests that, <u>if given properly</u> can provide useful information in preventing and identifying employee dishonesty?

This Congress we must determine a responsible position for the Federal government to take with regard to use of the polygraph in the workplace. We definitely need to regulate the polygraph's usage in the private sector in order to prevent unfair employment practices and discrimination from occurring against honest workers and prospective employees.

However, I must also express concern over a bill that would do nothing to prohibit or limit examination use within Federal, State, or local government entities, creating a double standard for private industry versus government use.

I look forward to hearing the testimony of today's witnesses. This issue is a difficult one for many of us on this Committee and in the Congress. We want to develop a fair Federal policy for all involved, a task which is not easy. I am confident that the testimony of this morning's panelists will provide us with the sort of insight that we need in order to make these difficult decisions.

Mr. MARTINEZ. Thank you, Mr. Gunderson.

Let me respond just a second. We held two extensive hearings last year, This time around we decided that we would seek new input. You just said in your opening statement that if we are being honest and fair with people that did not get to testify the last time, we should not open it to people that did.

But in regard to the congressional members, I think that we as colleagues have to extend that congressional courtesy to those members of Congress even though they may have testified before.

Mr. GUNDERSON. Mr. Chairman, the purpose of Congress is not for members to serve each other. It is for us to serve the public. And I think in all due respect to a couple of my best friends who are at the table, while I have a great deal of respect for both of them, this is not the purpose of this committee or any other committee to exist so that members of Congress may come and talk to each other. We have ample opportunity to do that.

I think the purpose of this Congress is to serve the public and to serve a legitimate and proper debate and a discussion of any issue, whether it be polygraph or anything else, and I am going to continue to insist that we give everyone who desires an opportunity to testify on this issue an opportunity to do so.

We have many months left in this year. We have all of next year left. Time is not a problem at this particular point and I think, as you well know, we have a very full agenda between now and the Easter recess on the floor of the House with a number of other issues. The likelihood of this being brought up in the next two weeks on the floor of the House do not exist.

Mr. MARTINEZ. Mr. Gunderson, I am not going to engage in debate before the debate, but I will simply state that when we extend courtesies to members of Congress, we are not servicing those members of Congress. We are simply allowing them a courtesy. That is simply all I was implying, and that is what I am implying now.

But more than that, you know that testimony is not only given orally and in person. The record will remain open and receive testimony from anyone wishing to have input into the question of whether or not we allow polygraph use in the general work force.

And with that I am going to turn to Congressman Williams, the author of the bill, and allow him to make an opening statement.

Mr. WILLIAMS. Thank you, Mr. Chairman, and our colleague, Mr. Gunderson, is as usual correct in his expression of concern and also I might add correct about how eminently fair we are and we will continue to be. There was an effort, not an insignificant effort, to move this bill directly to full committee and mark it up. I guess an effort occasioned by the fact that this issue is now two decades old in the Congress. And, given the fact that we had hearings on this bill and significant discussion about it for a year and three months before we moved it last time, there was thought to bypass this subcommittee.

The Chairman and I agreed and said, no, we have to have a hearing. We have to have a good number of witnesses. This is the first hearing I have attended in a long time where there are two pages of witnesses before us. Let us hear the testimony and see how it

comes out and make a decision as to whether or not we have given the issue appropriate consideration.

I want to thank the Chairman for starting early on H.R. 1212. Last year this bill, or one very similar after compromising, passed the House by a vote of 236 to 173. That was almost exactly a year ago this week. In that Congress, a bipartisan group of thirteen members of the House joined me in introducing this legislation. This year, 125 members of the House joined me in introducing this legislation and since I have introduced it, it is now at 140 co-sponsors; more than ten times what it was originally.

The bill simply prohibits the use of truth verification devices in the work place, for both pre-employment testing and testing during the course of employment. It requires employers engaged in interstate commerce to post a notice on the premises stated that, "Employers are prohibited by this Act from using a lie detector test on any employee or prospective employee." It provides remedies found in the Fair Labor Standards Act as amended. It does not apply to any individual employed by the United States government, nor would it apply to state or local government employees. That is a separate jurisdiction.

The American Polygraph Association tells me that last year about two million tests were given. That is triple the number of tests given just ten years earlier. So we are here considering an epidemic. The shocking fact is that the bulk of these tests are not being given by the FBI, or the CIA, or the National Security Agency, or the National Security Council, or your state or local police departments. Ninety-eight percent of those two million tests are being given by private business, 98 percent. Approximately three-fourths of those are given to people who do not as yet have a job with the employer giving the test. Only one-fourth are given to workers on the job accused of something.

This bill protects workers who are wrongfully denied employment and whose careers might be devastated based on the results of these questionable tests. Tens of thousands of workers are wrongfully denied employment every year, either because they refuse to take the test or because of the inherent inaccuracy of the machines or the incompetence of the operators.

Through the years, states have made sporadic efforts to control the use of this gadget. Twelve states and the District of Columbia have passed legislation prohibiting their use in the private work force. An additional ten states prohibit their use but permit an employee to request an examination. Nineteen states only regulate examinations or license examiners, while nine states have no regulation.

This patchwork legal maze has not proven effective. Often employers undermine state law by pressuring employees and job seekers to cross state lines to take the test or volunteer to take the test even when the state law prohibits requiring or requesting the examination. In states that completely ban the use of lie detectors, employers may avoid the law by hiring in a neighboring state which permits examination and then transferring the employee into the state where such testing is prohibited. It is clear now that state regulation has been perceived as a seal of approval on a

gadget thus resulting in the explosive rise to two million tests last year.

Our criminal justice system presumes that an individual is innocent until proven guilty. The lie detector abuses that principle because it requires you to demonstrate your innocence. The courts in this country refuse to admit lie detector results as evidence in trials. Is it not sadly ironic that those accused of crimes or those convicted of crimes are protected from this gadget but America's workers are not? This bill will put an end to that outrage.

Thank you, Mr. Chairman.

[The prepared statement of Hon. Pat Williams follows:]

PAT WILLIAMS
MONTANA (WESTERN DISTRICT)
MAJORITY DEPUTY WHIP

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BUDGET
CHAIRMAN
TASK FORCE
HUMAN RESOURCES
EDUCATION AND LABOR
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Opening Statement

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March 5, 1987

LET'S HALT THE LIE DETECTOR EPIDEMIC IN THE WORKPLACE

Mr. Chairman, today we begin our efforts to pass the Employee Polygraph Protection Act, HR 1212. Last year, my bill passed the House of Representatives by a vote of 236-173 on March 12, 1986. In the 99th Congress, a bi-partisan group of 13 members of the House joined me in introducing this legislation. This year, a bipartisan group of 125 members of the House joined me as original cosponsors of this bill. We now have 140 cosponsors.

My bill simply prohibits the use of truth verification devices in the workplace, for both pre-employment testing and testing during the course of employment. It requires employers engaged in interstate commerce to post a notice on the premises stating that "employers are prohibited by this Act from using a lie detector test on any employee or prospective employee." It provides remedies found in the Fair Labor Standards Act as amended. It does not apply to any individual employed by the United States government, nor would it apply to state or local government employees.

The American Polygraph Association estimates that more than two million polygraph tests are given each year. The number of tests given has tripled just in the last ten years! The shocking fact is that the bulk of these tests aren't being given by the FBI, CIA, NSA, or your state or local police departments. Ninety-eight percent of those two million are given by private business. Approximately three-quarters of these tests are given for pre-employment testing while the remaining one-quarter are used for investigations of workers.

The bill protects workers who are wrongfully denied employment and whose careers are devastated based on the results of these questionable tests. Tens of thousands of workers are wrongfully denied employment every year, either because they refuse to take the tests or because of the inherent inaccuracies of the machines and their operators.

Through the years, states have made sporadic efforts to control the use of this gadget. Twelve states and the District of Columbia have passed legislation prohibiting their use in the private workforce. An additional ten states prohibit their use but permit an employee to request an exam. Nineteen states only regulate examinations or license examiners while nine states have no regulation. This patchwork legal maze has not proven effective. Often employers undermine state law by pressuring employees and job seekers into crossing state lines to take the tests or "volunteering" to take a test even when the state law prohibits requiring or requesting an examination. In states that completely ban the use of lie detectors, employers may avoid the law by hiring in a neighboring state which permits examination and then transferring the employee into the state where such testing is prohibited. It is clear now that state regulation has been perceived as a "seal of approval" on the gadget thus resulting in the explosive rise to two million tests per year.

Our criminal justice system presumes that an individual is innocent until proven guilty. The polygraph abuses that principle because it requires one to prove innocence. The courts in this country refuse to admit polygraph results as evidence in trials because of the documented inaccuracies of these gadgets. It is sadly ironic that criminals are protected from polygraphs while American workers are not! My bill will put an end to this duplicity.

ACLU SURVEY OF STATE POLYGRAPH POLICIES

States with No Regulation 9

State	ACLU calls recd in yr	
Colorado	180 a yr	
Indiana	60 a yr	
N. Hampshire	10 a yr	
Kansas	24 a yr	
Missouri	24 a yr	
New York	800 a yr	(state labor dept 200 a yr)
N. Dakota	no staffed office	
Ohio	190 a yr	
Wyoming	no staffed office	
TOTAL	1,288 a yr	

ACLU Polygraph Survey
States Which Only Regulate Polygraph Examinations
or License Examiners 19

States	ACLU calls recd in yr	Board complaints	Suspensions
Alabama	12 a yr		none
Arizona	150 a yr	none since 6-85	none
Arkansas	50 a yr	8 since '79	1
Florida	240 a yr	7 in yr	1
Georgia	60 a yr	24 a yr	~~2 susp~~ 1 rev 1 susp.
Illinois	150 a yr	none	dont know
Kentucky	24 a yr	4 in last yr	2 susp 1 revoke
Louisiana	180 a yr	2 since 84	none
Mississippi	12 a yr	6 since '76	none
Nevada	17 a yr	20 a yr	none
N Mexico	50 a yr	2 or 3	looking at 1
N. Carolina	1 a yr	4 or 5	none in last yr sometime in past
Oklahoma	50 a yr	none	none
S.Carolina*	250 a yr	2 ever	no records
S.Dakota	no staffed office	none	none
Tennessee	50 a yr	7 or 8 (15 or 20 since '51)	1 revoke
Texas	200 a yr	16	none
Utah	1 a yr	1	2 ever
Virginia	50 a yr	6	none
TOTAL	1,544 a yr	97	~~7~~ 8 suspensions ~~3~~ 2 revocations

* = includes calls to S.C. Workers Rights Project, Inc.
ACLU Polygraph Survey

2

19

ACLU Polygraph Survey

States Which Prohibit Private Employers From Requiring Polygraph Examinations But Which Allow "Requests" of Polygraph Exams 10

State	ACLU calls recd in yr	Board complaints	Suspensions
California	55 yr	20*	none
Hawaii	12 a yr	2 a yr	just got investigator
Idaho	no staffed office	do not know of any	
Iowa	24 a yr	none	none
Montana	5 a yr	poly board: none labor dept: 2 a yr	none
Maryland	24 a yr	12 a yr	no licensure
Nebraska	50 a yr	1 ever	none
Pennsylvania	100 a yr	done by local DAs	no licensure
Vermont	6 a yr	none	none
Wisconsin	12 a yr	11 a yr	unsure
TOTAL	288	48	

* = Board formed in 1985

ACLU Polygraph Survey

States With Ban on Use of Polygraph in Private Employment
(No Requesting) 12 + DC

Alaska
Connecticut
Delaware
Maine
Massachusetts
Michigan * frequently
Minnesota
New Jersey * 1 or 2 a week
Oregon
Rhode Island
Washington
West Virginia
District of Columbia * frequently

* = reports of workers being asked to cross state lines to take polygraph

Mr. MARTINEZ. Thank you, Mr. Williams.

I am going to go right to the witnesses. Because I think Mr. McKinney has a time problem I call him first.

Mr. DARDEN. I will certainly defer to Mr. McKinney. I have no time problems.

Mr. MARTINEZ. All right, Mr. McKinney.

STATEMENT OF HON. STEWART B. McKINNEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CONNECTICUT

Mr. MCKINNEY. The fact is this is my fifth trip with this bill.

Mr. Chairman, I want to thank you for the opportunity of coming here.

Pat, I liked your statement. It was very good.

As you know, I have been actively involved at trying to ban polygraph use for many years. I have introduced polygraph legislation in the last four Congresses, and I eagerly give my support this year to H.R. 1212. And one of the reasons that I am such an ardent supporter of Mr. Williams' bill and forgot all about my own is that my bill was much tougher, and I realize it did not have a chance in the attitude of this Congress at the moment. The damage the polygraph is doing to thousands of Americans every year is appalling.

Last Congress, the House took a serious look at the issue of polygraph testing. Testimony overwhelmingly indicated the need to ban the use of mechanical interrogation devices that simply do not work. Time and time again it was pointed out that polygraph testing is highly inaccurate, that there is no scientific basis for polygraph testing and that the workers' rights were being violated. And yet, not only does the practice of the polygraph continue, but it is growing.

More than two million lie detector tests are administered in the private sector in this country every year. These tests, administered under the guise of trying to ferret out dishonest employees and applicants, are utilized by employers of all sizes and kinds, ranging from the Fortune 500 corporations to the 24-hour convenient stores.

Yes, in-house theft is a problem for many companies and drug abuse a major concern for many others. We in Congress realize the rights of companies to protect themselves from these and other problems inhibiting smooth and productive operation. Yet, we cannot tolerate stepping on or ignoring the rights of free Americans, employees and job applicants.

And, Mr. Chairman, I should add for the benefit of the committee, I was a small businessman, not a lawyer. I was in the auto tire business and parts supply business. And if you do not think you have to watch your P's and Q's in that business, well, let me tell you, because if you do not, the whole warehouse is gone. But you don't use lie detectors.

Far too often innocent people are labeled as liars and are unjustly denied employment or lose their jobs. Denying or dismissing reputable and productive personnel from jobs also impedes a productive operation, I would say.

I find it odd and even abominable that a fundamental principle of our law, namely the one that you are innocent until you are proven guilty, is violated all the time. I find it odd that our coun-

try's judicial system offers protection for our accused criminals and not protection for our people.

Ironically, last session's hearing pointed out that the lie detector has built-in bias against truthful people. The more honest workers are, the more likely they will fail the test because of their heightened sensitivity to having their honesty challenged.

Question: Have you stayed in a motel with a woman?

Answer: Yes, my wife, but can I say it, and what will they think.

I have a file full of questions that would drive you right up the wall, and the honest person does not know how to answer these questions. What is lying to this machine and what is not lying? And if the audience will forgive me, a tightened sphincter will make the machine lie all the time.

Never mind. We will go along without any more suggestions from me as to how you can cheat.

So it is the honest person that gets into the quandary. In addition, the test is biased against those with various physical conditions. And there is more and more evidence indicating that the machine has a built-in racial prejudice. I am sure you will hear more about this later on from the Legal Action Center of New York.

You will undoubtedly hear, Mr. Chairman, about the underenclusive nature of H.R. 1212. The question will be raised again and again, if we in Congress believe that the polygraph is so wicked, why not ban it for government use. It's a good question, but it is one that must not lead us away from our intention here today and it is one of the reasons I have supported Mr. Williams as strongly as I have.

My colleagues here know too well the political reality of this body. A total ban on polygraph use in this country would not be politically feasible to accomplish, although the polygraph is banned in almost every industrialized country in the world. In addition, polygraph use in the public sector has a much different purpose than in the private sector. And in fact if you want to see how far this body can go, you will be asked to vote on mandatory AIDS testing for all homeless this afternoon.

Also, Mr. Chairman, you will hear from witnesses who will advocate regulating the polygraph industry. Let me inform you, my fellow colleagues, that many states have regulations in place which have only led to a proliferation of lie detector tests accompanied by a higher rate of violation of workers rights. Some states have even gone so far as to prohibit polygraph use, but these laws are often not strict enough, allowing an employer to ask an employee to "volunteer" to take a test. What do you do when the boss says will you volunteer to take a lie detector test? Say no, and somewhat in your own mind it admits your guilt? No. What are the consequences when an employee refuses? We all know. It is also not uncommon for employers to transfer applicants across state lines to avoid interviewing them in states which prohibit polygraph use like Connecticut. The citizens of this country need a federal law to protect them from the dehumanizing ordeal of the polygraph.

Last session, polygraph legislation went all the way to the House floor and passed. I was not pleased with the outcome, as many amendments exempting various industries diluted the original

intent of the measure. However, the bill's passage was a big victory for the rights of the American people and the American worker.

I hope, Mr. Chairman, that H.R. 1212 moves quickly through this subcommittee and full committee so that we in the House can attest to the sober truth about the polygraph—that it is inaccurate, unreliable, intrusive and an unreasonable infringement on a person's right to privacy and ability to earn a living. Let us do our job and maybe this time our colleagues across the hall in the Senate will join us.

Thank you.

[The prepared statement of Hon. Stewart B. McKinney follows:]

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TESTIMONY OF THE HONORABLE STEWART B. McKINNEY (R-CT)

before the

U.S. HOUSE OF REPRESENTITIVES COMMITTEE ON EDUCATION AND LABOR

SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES

POLYGRAPH IN THE WORKPLACE

MARCH 5, 1987

Mr. Chairman, I want to thank you for this opportunity to participate at today's hearing. As you know, I have been actively involved in trying to ban polygraph use for many years -- I have introduced polygraph legislation in the last four congresses, and I eagerly give my support this year to H.R. 1212. The polygraph issue has been a high priority on my agenda, and I am glad that it is a high priority for this Subcommittee. My fellow colleagues, we know only too well the damage that the polygraph can do to one's livelihood and career, and the damage it is doing to thousands and thousands of American citizens every year.

Last Congress, the House took a serious look at the issue of polygraph testing. Testimony overwhelmingly indicated the need to ban the use of mechanical interrogation devices that simply do not work. Time and time again it was pointed out that polygraph testing is highly inaccurate, that there is no scientific basis for polygraph testing, and that workers' rights are being violated. And yet, not only does the practice of the polygraph persist, it's growing.

More than 2 million lie detector tests are administered in the private sector in this country every year. These tests, administered under the guise of trying to ferret out "dishonest" employees and applicants, are utilized by employers of all sizes and kinds, ranging from Fortune 500 corporations to 24-hour convenient stores. Yes, in-house theft is a big problem for many companies and drug abuse a major concern for many others. We in Congress recognize the rights of companies to protect themselves from these and other problems inhibiting smooth and productive operation. Yet, we cannot tolerate stepping on or ignoring the rights of emloyees and job applicants. Far too often innocent people are labeled as liars and are unjustly denied employment or lose their jobs. Denying or dismissing reputable and productive personnel from jobs also impedes a productive operation, I might add.

I find it odd and even abominable that a fundamental principle of our law, namely that one is innocent until proven guilty, is foresaken by allowing our country's workers to be subjected to polygraph testing, forcing them to prove their honesty and integrity. I find it odd that our country's judicial system affords basic protection of rights to criminals by excluding lie detector results as evidence in courts, and yet this same right is not given to our nation's workers.

Ironically, last session's hearing pointed out that the lie detector has a built-in bias against truthful people. The more honest workers are, the more likely they will fail the test because of their heightened sensitivity to having their honesty challenged. In addition, the test is biased against those with various physical conditions. And there is more and more evidence indicating that the machine has a built-in racial prejudice. I am sure you will hear more about this later on in this hearing from the Legal Action Center of New York representative.

You will undoubtedly hear, Mr. Chairman, about the underenclusive nature of H.R. 1212. The question will be raised again and again, if we in Congress believe that the polygraph is so wicked, why not ban it for government use. It's a good question, but one that must not lead us away

from our intention here today. My colleagues here know too well the political reality of this body. A total ban on polygraph use in this country would not be politically feasible to accomplish, although the polygraph is banned in almost every industrialized country in the world. In addition, polygraph use in the public sector has a much different purpose than the private sector.

Also, Mr. Chairman, you will here from witnesses who will advocate regulating the polygraph industry. Let me inform you, my fellow colleagues, that many states already have regulations in place which have only have led to a proliferation of lie detector tests accompanied by a higher rate of violation of worker rights. Some states even have gone so far as to prohibit polygraph use, but these laws are often not strict enough, allowing an employer to ask an employee to "volunteer" to take a test. What are the consequences when an employee refuses to volunteer? We all know. It is also not uncommon for employers to tranfer applicants across state lines to avoid interviewing them in states which prohibit polygraph use. The citizens of this country need a federal law to protect them from the dehumanizing ordeal of the polygraph.

Last session, polygraph legislation went all the way to the House floor and passed. I was not pleased with the outcome, as many amendments exempting various industries diluted the original intent of the measure. However, the bill's passage was a big victory for the rights of the American people. I hope, Mr. Chairman, that H.R. 1212 moves quickly through this subcommittee and full committee so that we in the House can attest to the sober truth about the polygraph -- that it is inaccurate, unreliable, and intrusive, an unreasonable infringment on a person's right to privacy and ability to earn a living. Let's do our job and maybe this time the Senate will follow suit.

Mr. MARTINEZ. Thank you, Congressman McKinney.

Do you have to leave now or can you wait for a few questions?

Mr. MCKINNEY. I have got a few more minutes.

Mr. MARTINEZ. All right. Congressman Darden.

Mr. MCKINNEY. I want to hear Mr. Darden anyway. Rare opportunity.

STATEMENT OF HON. GEORGE DARDEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. DARDEN. I want to thank you, Mr. Chairman, and members of this committee for the opportunity to testify here today before you. And I also want to state that our colleague, Mr. Bill Young from Florida, would be here but he has a commitment in another committee. I believe it is the Defense Appropriations Subcommittee, and adopts my testimony this morning as his view on the subject. I also want to commend you, Mr. Chairman, and you, Mr. Williams, for taking the lead in bringing this issue forward and for consideration in the Congress. I think you are doing the nation a service by raising public sensitivity to this issue.

We all believe that something must be done to curb polygraph abuse. Last year, this committee heard testimony from employees who had lost their jobs and whose careers had been seriously jeopardized as a result of improperly administered polygraph examinations. We in Congress, I believe, have the responsibility to regulate the use of polygraph examinations and to stop these abuses from happening.

But what we must determine here today, I think where disagreement follows, is how do we best do that. There are a number of solutions being proposed, and I am suggesting one way while this committee has taken a different approach. I think we are all trying to do the same thing. It is just a difference in how we get to the final result or the final product.

Personally, I believe we would best serve the public by working together to develop a bill that offers protection for consumers and employees through rigorous but fair regulation of polygraph use in the private sector.

I hope the final solution that we develop does allow us to curb polygraph abuse, but also help American businesses protect their personnel, their property and information as well as the public at large.

I believe that internal investigations are the most effective way of detecting crimes before they affect customers and the public. Both private businesses and the government have found that the polygraph can be useful as one element in these internal investigations. And let me emphasis one element, and not certainly a complete determinant. The polygraph has been endorsed by top officials at the Defense Department, the CIA, and the other national security agencies as being up to 95 percent effective. Yet all of us know that the polygraph is not foolproof. If there were a foolproof way to detect employee theft or to conduct criminal examinations, I am sure that we would all advocate using it by now. But there is not. In this imperfect world, polygraph examination results with a 95 percent accuracy rate, or at least up to a 95 percent accuracy

rate, can be very valuable as a part of the evidence gathered in an investigation, either in the public or the private sector.

I think we all know that crime in America continues to be an ever-growing concern, and I believe that the polygraph can help American businesses protect themselves and the public.

Last year, and I am sure you are familiar with these figures, they have come out in testimony before, crimes against business cost the American economy at least $40 billion annually with some estimates putting the cost at up to $200 billion a year. The National Association of Chain Drug Stores says that prices are 10 to 15 percent higher because of losses due to theft, and we are talking about inside theft and not shoplifting.

The accounting firm of Arthur Young & Company found that internal theft, and not shoplifting, is one of the leading causes of increasing retail losses. Each consumer in the United States today spends an extra $300 a year to compensate for these losses. This frankly is an added tax which consumers must bear. Businesses have an obligation not only to protect their stockholders but to the public to contain these losses.

But it is not just our pocketbooks that are hurt by these crimes. Insider thefts can be a matter of life and death. An estimated $1 billion in drugs are stolen from the pharmaceutical industry every year. The Drug Enforcement Administration says that when these stolen, but legally produced, drugs reach the black market, or are used improperly, they kill and injure twice as many people as do illicit drugs such as heroin and cocaine.

The banking and securities industry also is increasingly vulnerable to inside crime as we have seen by the recent revelations on Wall Street. The American Bar Association says that business computers are now being used to embezzle money, alter data and defraud corporate stockholders of up to $730 million a year. The ABA said employees are responsible for 78 percent of these losses.

Further, the American Bankers Association says that there were about 6,300 instances last year of bank fraud and embezzlement by employees in 1985 as opposed to 6,000 bank robberies. But banks lost 17 times more money to insider crimes than they did to bank robberies.

So therefore, I believe American businesses must have access to the investigative tools they need to do the best job they can in protecting their assets and inventories, their information, and customers.

And like I say, it is a lot more difficult to protect assets of a multinational company than it is a tie store up in Connecticut somewhere.

Courts in states such as Arizona and Missouri have upheld the use of polygraph testing. And in my home state of Georgia, as in other states, the Supreme Court allows admission of polygraph results as evidence with the prior consent of the parties. In other words, you can stipulate prior to the taking of the test that it will be admitted as evidence.

One of the reasons I asked to come before this committee today because I believe I bring a special perspective to the committee. I had experience with the polygraph when I was a district attorney in Cobb County, Georgia, a rapidly growing community in the met-

ropolitan Atlanta area. And while I served as a gang busting, crime fighting corruption-eliminating district attorney, I found that it could be used quite reliably as an investigative tool. As defense counsel, I also found instances where we were able to exonerate persons who were wrongfully accused of the crime. Even eye-witness testimony is not perfect, and there are more people today in the prisons of America who were wrongfully committed and convicted on eye-witness testimony, which is mistaken, than for any other reasons.

And let me say parenthetically that I was a district attorney and I was a defense counsel, and a number of my detractors back in my jurisdiction used to say that I put more people in prison as a defense counsel than I did as a prosecuting attorney. [Laughter.]

The polygraph, though, I do believe helps exonerate the innocent in private businesses where many employees have kept their jobs because of polygraph examination proved they were innocent of a crime committed in their work area.

But a polygraph, as I said before, is useful, but it is not infallible. I do not believe that it is witchcraft as it has been characterized by some of us here today. But I believe that we do need to have legislation to set minimum federal standards on a nationwide basis to assure that the polygraph is used fairly, accurately and consistently whenever and wherever the tests are given.

I believe we all have the same goal here today, in other words. We all want to protect the innocent and frightened employee from being subject to a polygraph test with his or her job hanging in the balance based upon the results.

We also want to prevent improperly trained examiners from using equipment that is not reliable and that could skew the results. The polygraph is only as good as the examiner, and it is essential that the examiners be well trained and responsible if the results of the tests are to be of any value. My bill would also set strict standards for the polygraph examiner training and equipment.

Our state legislature in Georgia, of which I was a former member, has developed legislation that addresses the concerns of all the parties in this issue. I think it would be an abuse of power for us in Congress to pass legislation here that would simply sweep and set aside the legitimate deliberations of the Georgia General Assembly and other state legislatures throughout the country.

For example, my colleague, Mr. McKinney, has already stated that his particular state, Connecticut, prohibits the use of polygraph in the private sector. I think that is proper if the state wants to take that action, and my bill would not preempt that rule.

However, the bill that Congressman Young and I will offer sets minimum federal standards while permitting states to continue to function in their legitimate roles to develop their own polygraph laws.

I believe, again, that we all want to accomplish the same thing—to protect employees, employers and consumers. And now I finally want to get to what I think is the thrust, though, of the problem we face.

I cannot justify and I do not believe we can justify giving the public sector the use of the polygraph while denying it to the pri-

vate sector. Nuclear power plants, public utilities, trucking, pharmaceutical companies are just a few of the many industries that have tremendous responsibilities to guard the public health and safety. If the polygraph can be useful to them, then I believe they should be able to use it.

We owe the private sector the same degree and the same amount of protection that we owe the Department of Defense. The Congress voted two years ago 333 to 71 to authorize the Defense Department to expand its use of the polygraph to help guard national security. The government sets standards for how it should be used to help ensure its accuracy and to protect the rights of those who are subject to the examinations. I do not believe that we owe the private sector any less.

Another option we have to equalize this imbalance would be to curtail its use entirely—to ban it both in the private and public sectors. And quite frankly, this would be more consistent, in my view. That approach would be far more preferable than the double standard that we seem to be contemplating here today. If the polygraph does not work in the private sector, it does not work in the public sector either.

I am not suggesting that my bill contains all the answers, nor do I believe that an outright ban of the polygraph in the private sector is the answer. I would support the necessary restrictions and safeguards on the use of the polygraph technique. What I would hope we can do is work together in a bipartisan fashion to develop a fair and reasoned solution that recognizes all points of view in this debate.

I want to thank you again for your courtesy in allowing me to be here today. I look forward to working together with you to fashion a solution to a very serious problem that we all agree has significant implications on the private and public sector.

[The prepared statement of Hon. Buddy Darden follows:]

PREPARED STATEMENT OF HON. BUDDY DARDEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

I want to thank the chairman and members of the committee for this opportunity to testify here today. I also would like to commend my colleagues Mr. Williams and Mr. Martinez for taking the lead in bringing this issue forward for consideration by Congress. You are doing the nation a service by raising public sensitivity to this issue.

We all believe that something must be done to curb polygraph abuse. Last year, this committee heard testimony from employees who had lost their jobs and whose careers had been seriously damaged as a result of improperly administered polygraph examinations. We in Congress have a responsibility to regulate the use of polygraph examinations to stop this from happening.

What we must determine is the best way to do that. There are a number of different solutions being proposed. I am suggesting one way while this committee takes a different approach. I believe that we would best serve the public by working together to develop a bill that offers protection for consumers and employees through rigorous, but fair, regulation of polygraph use in the private sector.

I would hope that the final solution that we develop allows us to curb polygraph abuse while helping American businesses protect their personnel, property, and information as well as the public at large.

Internal investigations are the most effective way of detecting crimes before they affect customers and the public.

Both private businesses and the government have found that the polygraph can be useful as one element in these internal investigations. The polygraph has been endorsed by top officials at the Defense Department, the CIA, and other national security agencies as being up to 95 percent effective. Yet all of us know that the polygraph certainly is not foolproof. If there were a foolproof way to detect employee theft or to conduct criminal examinations, I am sure that we would all advocate using it. But there is not. In this imperfect world, polygraph examination results with a 95 percent accuracy rate can be very valuable as part of the evidence gathered in an investigation, either in the private or the public sector.

Crime in America is a serious concern, and the polygraph can help American business protect itself and the public.

Crimes against business cost the American economy at least $40 billion annually with some estimates putting the cost at $200 billion a year. The National Association of Chain Drug Stores says that prices are 10 to 15 percent higher because of losses due to inside theft. The accounting firm of Arthur Young and Company found that internal theft -- not shoplifting -- is the leading cause of increasing retail losses. Each consumer in the United States spends an extra $300 a year to compensate for these losses. This is an added tax that consumers must bear. Businesses have an obligation not only to their stockholders but also to the public to contain these losses.

But it is not just our pocketbooks that are hurt by these

crimes. Insider thefts can literally be a matter of life or death. An estimated $1 billion in drugs are stolen from the pharmaceutical industry every year. The Drug Enforcement Administration says that when these stolen, but legally produced, drugs reach the black market or are used improperly they kill and injure twice as many people as illicit drugs.

The banking and securities industry also is increasingly vulnerable to inside crime. The American Bar Association says that business computers now are being used to embezzle money, alter data, and defraud corporate stockholders of up to $730 million a year. The ABA said employees were responsible for 78 percent of these losses.

Further, the American Bankers Association says that there were about 6,300 instances of bank fraud and embezzlement by employees in 1985 as opposed to 6,000 bank robberies. But banks lost 17 times more money to the insider crimes than to robberies.

I believe that all American businesses must have access to the investigative tools they need to do the best job they can in protecting their assets and inventories, their information, and customers.

Courts in states such as Arizona and Missouri have upheld the use of polygraph testing. And in my home state of Georgia, as in other states, the Supreme Court allows admission of polygraph results as evidence with the prior consent of both parties.

One of the reasons that I asked to come before this

committee today to speak on this subject was because I believe that I bring a special perspective. I had experience with the polygraph when I was a district attorney in Cobb County, Georgia, a rapidly growing community in the metropolitan Atlanta area. We used the polygraph quite reliably as an investigative tool. As a defense counsel, I used it in many instances to exonerate persons who were wrongfully charged with a crime. Even eye-witness testimony is not perfect. There are more people in the prisons of America who were wrongfully convicted on mistaken eye-witness testimony than for any other reasons.

The polygraph also helps exonerate the innocent in private businesses where many employees have kept their jobs because a polygraph examination proved they were innocent of a crime committed in their work area.

The polygraph is useful, but it is not infallible. And that is why I have introduced a bill to set minimum federal standards on a nationwide basis to assure the polygraph is used fairly, accurately, and consistently whenever and wherever the tests are given.

I believe that we have the same goal. We all want to protect the innocent and frightened employee from being subject to a polygraph test with his or her job hanging in the balance based upon the results.

We also want to prevent examiners from using equipment that is not reliable and that could skew the results. The polygraph is only as good as the examiner, and it is essential that

examiners be well trained and responsible if the results of the tests are to be of any value. My bill also would set strict standards for polygraph examiner training and equipment.

Our state legislature in Georgia, of which I was a member, has developed legislation that addresses the concerns of all parties on this issue. I think it would be an abuse of power for us to pass legislation here that would simply sweep aside the legitimate deliberations of the Georgia General Assembly and other state legislatures across the country. The bill that Congressman Young and I have offered would set minimum federal standards while permitting states to continue to function in their legitimate roles to develop their own polygraph laws. Our bill also would give individual states full authority to legislate more stringent polygraph regulation or even to prohibit the use of the polygraph in the private sector.

I believe that we want to accomplish the same thing -- to protect employees, employers, and consumers. I just can't justify giving the public sector the polygraph while denying it to the private sector. Nuclear power plants, public utilities, and trucking and pharmaceutical companies are just a few of the many industries that have tremendous responsibilities to guard public health and safety. If the polygraph can be useful to them, then I believe they should be able to use it.

We owe the private sector the same degree and the same amount of protection that we owe the Defense Department. The Congress voted 333-71 two years ago to authorize the Defense

Department to expand its use of the polygraph to help guard national security. The government sets standards for how it should be used to help ensure its accuracy and to protect the rights of those who are subject to the examinations. I don't believe that we owe the private sector any less.

Another option we have to equalize this imbalance would be to curtail its use entirely -- to ban it both in the private and public sectors. That approach would seem to me preferable to the double standard that is being contemplated. If the polygraph does not work in the private sector, it surely does not work in the public sector either.

I am not suggesting that my bill contains all of the answers, nor do I believe that an outright ban of the polygraph in the private sector is the answer. I would support necessary restrictions and safeguards on the use of the polygraph technique. What I would hope we could do is work together to develop a reasoned and fair legislative solution that recognizes all points of view in this debate.

I thank the committee for giving me the opportunity to testify here today and look forward to working with you to develop a bill that is fair to employers, employees, and consumers alike.

Mr. MARTINEZ. Thank you, Congressman Darden.

I forgot to tell you that we have a five minute rule, but that is okay, because in Gunderson's opening remarks he talks about fairness. I now give Congressman McKinney 30 minutes to rebut. [Laughter.]

I would like to introduce the newest member of our committee, Fred Grandy, from Iowa. Welcome to the committee.

Mr. GRANDY. Thank you, Mr. Chairman. I would like to say I was not given a polygraph test to get that job. [Laughter.]

Mr. MARTINEZ. Thank you.

I will turn to Mr. Williams now for any questions he has of the members.

Mr. WILLIAMS. I want to say, Stu, before you leave that you have been the leader for a long time on this issue in the Congress. I recognize that. People concerned about workers' rights should recognize that. Only the vagaries of the minority and majority system prevent more recognition of your leadership.

Mr. MCKINNEY. Well, I reached too far, gentlemen. Excuse me. Because of you have criminal penalties, you have civil penalties, et cetera, et cetera, et cetera.

Mr. WILLIAMS. We appreciate and continue to follow your good counsel and leadership on this.

Buddy, you and I have gotten along well on this issue and we will continue to do so. I appreciate your assistance and competition on it. I think, as you do, it is healthy for finding the best piece of legislation we can get.

The state of South Carolina has regulated examinations, polygraph examinations since 1972, Buddy. And in 1984, the legislative audit counsel of South Carolina General Assembly conducted a sunset review of the lie detector program as required. And among other things, they concluded this:

"The program did not adequately handle the complaints, conduct, inspect, or monitor the industry. The program cannot ensure that the public is protected against incompetent and/or unethical operators."

I think that we would find that in state after state of regulated jurisdictions. I worry that if we follow your procedure and regulate it nationally that we will then spread that problem all across this country. The great explosion in lie detectors, Buddy, is when they are regulated. That is when businesses begin to use them because the public begins to trust the gadget.

I do not even know whether you agree with the basis of my premise or with what was found by the legislative audit counsel in South Carolina, or whether you would agree that could be extended to other states. But if the gadget appears to be as unreliable as I think most evidence now indicates it is, what warrants you to think that we ought to standardize it across America?

Mr. DARDEN. Well, first of all, with reference to the state of South Carolina which is a neighboring state to Georgia, I have always had serious question about their wisdom ever since they fired on Ft. Sumter and started the Civil War. [Laughter.]

But seriously, seriously, Mr. Williams, I think you have a legitimate concern. However, use of the polygraph may well grow under

a legitimate licensing and standards act, because then I think you will certainly curb the number of potential abuses on the system.

I think when you consider that 2 million tests are given annually and only a handful of instances come to the attention of this committee where people have been improperly treated, I think the factor, or the mistake, or error, or abuse is considerably reduced, and that's what we are talking about.

I do not think administering of a polygraph test per se means that anyone is losing a valuable civil right. I think that a person though has a right, and we ought to preserve that right to a fair and properly administered test by a qualified examiner.

Mr. WILLIAMS. I cannot disagree with your critical judgement about your neighboring state. Let me bring it closer to home.

Two newspapers which serve your county in your state have run fairly recent editorials, and I ask unanimous consent that these editorials may be included as part of the record.

Mr. MARTINEZ. Without objection, so ordered.

[The articles follow:]

THE ATLANTA CONSTITUTION

For 118 Years the South's Standard Newspaper

James M. Cox, Chairman 1950-1957—James M. Cox Jr., Chairman 1957-1974

Jay Smith
Publisher

Jim Minter, *Editor* · Tom Teepen, *Editorial Page Editor* · Glenn McCutchen, *Managing Editor* · Minor J. Ward, *President*

PAGE 14-A, FRIDAY, OCTOBER 3, 1986

Polygraph is living its own lie

As Congress' final-days frenzy hits its stride, the casualty list mounts. One worthy measure apparently down for the count is the Polygraph Protection Act, which would ban lie-detector tests by private employers. This time around, the proposal came closer to passage than ever before, but it now seems certain time will run out before the Senate can offer a final yea or nay.

That's a pity, because one central fact has emerged from the debate on this issue: Lie-detector tests are anything but truthful. Employers who use them as a way to keep workers honest make several mistakes.

First, they kid themselves. Polygraph tests do not detect deception at all. Rather, they measure fear, as indicated by heartbeat and skin moisture. Practiced con artists can manipulate the machine to their advantage while scared innocents may appear to lie.

Not only can "the box" give employers a false sense of security, its use can abridge some fundamental rights of workers.

An estimated 2 million polygraph tests are given each year in the United States. Yet the congressional Office of Technology Assessment says studies it has reviewed show such inquiries are on target anywhere from 64 to 98 percent of the time. Which means at best, 40,000 Americans yearly may be falsely implicated, and at worst, 720,000.

Ah, but it's a great intimidation tool, say some employers; often a suspected worker will confess to a misdeed as soon as he is asked to take the test. The problem with that reasoning is obvious: It sacrifices the rights of the innocent in order to ferret out the guilty. That approach runs directly contrary to some basic American principles.

What's more, it's a mighty strange way to find miscreants. Maybe some do panic and confess. But the smarter ones likely won't. What will they have to lose? If they stay cool, they may beat the box. If they register "deception" — well, so what? So do plenty of innocent people.

Any employer who thinks the polygraph is a panacea for employee pilferage and the like is mistaken. When the new Congress convenes next year, it needs to scrap the lie detector as a management tool.

The Atlanta Journal
THE ATLANTA CONSTITUTION

James M. Cox, Chairman 1950-1957—James M. Cox Jr., Chairman 1957-1974

Jay Smith
Publisher

Jim Minter, Editor
Tom Teepen, Editorial Page Editor
Glenn McCutchen, Managing Editor
Minor J. Ward, President

Weekend's editorial page is prepared by the editorial board of The Atlanta Constitution.

PAGE 18-A, SATURDAY, NOVEMBER 8, 1986

Polygraph an unreliable spy-catcher

The federal government made major progress last year in its effort to shore up its defenses against spies, reducing by 800,000 the number of federal employees and contractors with security clearances. Now Uncle Sam whispers secrets into the ears of a mere 2.2 million workers and 1.4 million contractors, says the Government Accounting Office.

Clearly, more cuts are in order. The number of bureaucrats alone who retain clearances surpasses the population of metro Atlanta and that of many states.

Reduction not only limits possibilities for security risks, it also allows the feds to better oversee workers who remain privy to secrets. As the ranks of cleared workers ballooned over the years, the feds had all but abandoned their policy of conducting periodic reinvestigations.

Another benefit from the cuts: With fewer cleared workers, officials are less likely to classify paperwork unnecessarily. In the old days, overclassification inadvertently eroded respect toward secret designations.

Meanwhile, administration spy-busters have created one problem in their otherwise salutary effort: They are far too enamored of the polygraph machine. Since 1981, the Pentagon has more than doubled the number of lie-detector tests given to employees. Last year, 13,800 were wired to the box, up 2,700 from the year before; in all, 18,213 tests were administered in agencies involved with national-security matters.

The tests are highly unreliable. Skilled spies can evade detection on the machines while scared-but-honest folks can sometimes register deception. The machines measure nervousness more than truthfulness.

And what did the feds learn from their tests? Apparently not much. Only twice in 1985 did a lie-detector test result in a denial or revocation of security clearance.

The government is on the right track with its anti-spy campaign — but it needs to resist unacceptable high-tech shortcuts.

Mr. WILLIAMS. But, I would like to read just the closing sentence in each editorial written no doubt by fellow citizens of yours.

The first says, "Any employer who thinks the polygraph is a panacea for employee pilferage and the like is mistaken. When the new Congress convenes next year, it needs to scrap the lie detector as a management tool."

And the Atlanta Journal summed up by saying this with regard to the lie detector, "The government is on the right track with its anti-spy campaign, but it needs to resist unacceptable high tech shortcuts."

Mr. DARDEN. May I respond, Mr. Williams, by saying that they also state that my bill ought to be placed in the trash can and you did not read the more embarrassing parts of those editorials. But I would point out to you that those same newspapers last year did endorse my candidacy for reelection to Congress. [Laughter.]

Mr. WILLIAMS. Well, I certainly agree with that.

Mr. MARTINEZ. I can understand why they did have their own Elliot Ness. I mean from your early description of your activities as district attorney.

Mr. WILLIAMS. Thank you, Mr. Chairman.

Mr. MARTINEZ. Thank you, Mr. Williams.

I will turn to Steve Gunderson now.

Mr. GUNDERSON. I think those same editorial boards endorsed Ronald Reagan for reelection too. So editorial boards, we refer to them when they do something we like.

Buddy, you talk about the valuable use of polygraph as an investigative tool. That would seem to suggest that you do not believe that the polygraph ought ever be used by itself in terms of making a total and complete decision; is that correct?

Mr. DARDEN. Absolute not, you are correct, Mr. Gunderson. In fact, my bill provides that it cannot be used by itself. I envision using, let us say a bank has a potential theft or theft has occurred, and there are let us say six employees who have access to the records or the money that has been taken. Then the polygraph could be used to question as part of the process there, and many times would help focus on the particular suspect.

But more importantly, more importantly, can be used to exonerate, to exonerate five people, or perhaps all six of them.

My experience with the polygraph where its inaccuracy has been involved have been that people who actually lied go off, or got by the test, not the other way around.

Mr. GUNDERSON. My concern about the use of the polygraph, because I share Mr. Williams' cynicism about its validity, is that we use it in the absence of other factors, and I have consistently suggested that what we ought to do is ban the use of polygraph in preemployment screening where there is no other history or basis for a decision to be made.

How do you respond to that concept?

Mr. DARDEN. I would support that concept so long as you say that it is the only and sole determinant, it should be banned. I think it ought to be used in concert with other investigative aids. I think the background examination, for example, one's past experience, one's past performance on other jobs, that is perhaps the single most, single most effective way.

However, I think we all agree that it is very difficult to get the true facts about a person's past employment from a past employer. I think we all have a tendency to be quite generous to employees whose performance has not been stellar in the past. And when they leave us, we want to see them do well in other places. So I do not think a background check totally by itself is sufficient. In many instances, finger printing is required. I think that is a bit drastic. But I, frankly, would rather be subjected to a lie detector test or a polygraph examination than a finger print examination. And I think we ought to use polygraphs as a component of an overall background examination and pre-employment screening should never be solely determined by the use of polygraph. And that is done today in many instances, I regret to say, and that should not be permitted.

Mr. GUNDERSON. I am amazed that smoking actually is proven to kill people and the maximum government response is labeling. The maximum impact of an incorrect polygraph is that you are going to lose your job, and yet we are suggesting that we totally prohibit that. You come from a strong background in criminal law where the reading of rights is an automatic right that ought to occur.

Perhaps what we ought to do in polygraphs is just that; we ought to require some labeling and we ought to require before a polygraph can ever be administered that the administrator of that polygraph test read, to the person about to be tested, a statement indicating that the polygraph, in and of itself, is not a valid, credible test and has been proven to be consistently wrong and therefore cannot be used solely by itself as a determinant.

How do you react to that kind of a concept?

Mr. DARDEN. I accept that suggestion. I think it is a very valid one. I have included it in the bill that Mr. Young and I will introduce in that the examinee, or the potential examinee receives a written form stating that a polygraph is to be administered, that it cannot be used solely to determine whether or not that person is employed or not, and that, more or less, the rights of the person, including the right to decline to take that polygraph examination, should be in.

I think you are on the right track insofar as I am concerned and, again, I think we ought to do all we can to prevent the abuse, and I think measures like this would come more closely to reducing or eliminating abuse than just an outright ban in the private sector.

Mr. GUNDERSON. Thank you, Mr. Chairman.

Mr. MARTINEZ. Thank you, Mr. Gunderson.

Mr. Grandy.

Mr. GRANDY. Thank you, Mr. Chairman.

I am new to this issue, Congressman Darden, so forgive me if I ask what seem to be naive questions. I am concerned that the margin of error is estimated to be anywhere between 90 percent and 40 percent in polygraph testing. Do you believe it is within those parameters?

Mr. DARDEN. No, sir, I think your figure on the low side, 40, is not correct, unless you and I were giving the examination and serving as the examiner perhaps it would go that low. But for a properly trained professional, who has studied the issue, who has given tests before as an intern and maybe a years experience, I think

that figure would be from 85 percent to 95 percent, and I think you have touched on the real problem is the qualification of the examiner, and this is what our bill seeks to do.

Mr. GRANDY. Let us assume it is 80 to 85 percent accurate. Are there presently any means of recourse to people that are unfairly assessed by the test and are perhaps innocent? What is their means of redress right now? Assuming we have a private sector in place, what provisions exist for people who are innocent but proven guilty under the test?

Mr. DARDEN. First of all, a civil redress is provided in that you can go into federal court and you can bring an action against that particular company. So you can go in a state court, for that matter. A remedy is provided.

Now right now there is no remedy except as might be established by case law. There is no specific federal right to come into court and petition for redress of your grievances under statute. The few cases that have been decided, and I think Mr. Williams referred to them earlier, have been a result of case law and not as a statute. And I think that one thing that this committee ought to do in any bill, regardless of what it says, is to provide a specific statutory right and a mechanism for coming into a federal or a state court to assert that particular grievance and to obtain damages against a person who violates certain minimum standards.

Mr. GRANDY. Do you have any figures showing the number of companies who have decided against using polygraph testing and have ruled it out of hand simply because they are concerned about the margin for error?

Mr. DARDEN. No, sir, I do not. I have—as I visit companies in my capacity as a member of the Armed Services Committee, I will sometime ask them what is their policy on polygraphs, and I have not been able to establish any clear pattern, but I have no specific hard data.

Mr. GRANDY. I am concerned about the fact that there is a possibility for wrongfully accusing someone with this kind of test and there does not appear to be anything here that allows them any kind of automatic redress. I must say that I agree with Mr. Gunderson that if this is going to be administered, it ought to be administered after the fact.

Let me ask you what the status is of the technology of polygraph testing? Has there been an improvement in the test over the last 20 years? Is it more effective now than it used to be?

Mr. DARDEN. In my view, Mr. Grandy, it is certainly more effective now than it has been. Of course, we have seen a technical revolution in this country, not only in the past 20 years but in the last three years and certain high tech concepts, and this, of course, this technology, some of it has been applied to the polygraph or the lie detector so that a number of components of the machine have been able to incorporate some of this new technology.

Mr. GRANDY. But if it is only 85 percent effective now and has the capability of being 95 percent effective, are we not premature in allowing it to be used in the private sector until there is a possibility of a higher success rate? Should we let the technology dictate the law to us rather than dictate the law to the technology?

Mr. DARDEN. Well, first of all, remember it is being used now and being used very extensively right now to the extent of 2 million people per year in this country are administered a lie detector test, so it is being used rather extensively.

What I am after by my solution is try to, if not eliminate, to reduce substantially the number of abuses that take place. And I think that the number of abuses are, frankly, or at least the percentage happen to be diminishing over the years. But, again, this system, polygraph, lie detector or whatever you call it, certainly is not perfect. It is not infallible, but neither is any system in this work.

As I mentioned before that there are more people today in the prisons of America because of mistaken eye-witness testimony than for any other reason. And certainly the institution which we belong, which has established a record of almost 200 years now, is not perfect. There will always be imperfections and there will always be a margin for error.

Mr. GRANDY. Thank you, Congressman.

Thank you, Mr. Chairman.

Mr. MARTINEZ. Thank you, Mr. Grandy.

For point of clarification, where did you get the difference in percentages? I would ask that question, is the 95 percent accuracy rate a national scale and measured by whom?

Mr. DARDEN. I was referring to polygraph testing as used by the national security agencies, the CIA and the FBI. They find them, Mr. Martinez, to be 85 to 95 percent correct. And I think you are making a good point because they, they have certain established procedures and highly qualified examiners, and I think that is the key to it is to regulate the industry in such a way that you are sure that you do not have some jackleg or shady tree type examiner administering this test and that you do have a highly qualified professional.

Mr. MARTINEZ. Believe me, there are many states where they are not regulated, where you find just the exact type that you are talking about. I think if they measured the test accuracy there, that percentages would drop more to what Mr. Grandy suggested, of 40 percent. That figure he referred to, I have heard, too, percentages must depend on whose information we are looking at.

I know in three particular instances enforcement agencies whose polygraphers, it was determined after several instances, were entering their own biases into the final decisions whether this person lied or not. So in these instances it is not just the machine; it is the personnel too as you have suggested.

The trouble is even if you set in place regulations, I doubt that you are ever going to be able to train a polygrapher to ensure that he is going to be accurate in every case. Even though most large police departments provide as a part of the testing of polygrapher a psychological profile we sometimes get, fortunately it is only in the small instance, crazy cops.

In reference to your testimony you agree that polygraphs should only be used as a part of an investigation. How do you establish how much it should be used? How do you determine that the person doing the investigation does not use the result of a polygraph test to govern or dictate his thinking in the investigation

which leads him to the same conclusion that was reached from the polygraph test.

How do you guard against that?

Mr. DARDEN. Briefly two areas of response.

First of all, this bill would not apply to any crazy cops. This bill applies solely to the private sector and totally exempts, it totally exempts, as 1212 does, all federal government employees, all state and local employees.

Mr. MARTINEZ. I know that. I was only referring to that fact to establish that you cannot positively test someone to make sure they are going to do the right thing in every situation.

Mr. DARDEN. Well, first of all, I think you need to provide for an independent examiner, and it does. You should not have an in-house or company employee administering the test. You ought to have someone who has no interest in the outcome of the investigation. That is how I think that, one, that you would make that determination. In other words, keep it totally out of the framework of the company, because surely I know and surely you know that if you work for the company, it is going to affect your judgment.

Secondly, I think that you can provide certain standards in the bill as to what effect a polygraph might have, but I totally agree with the problem here and this is something I think we need to say here.

Mr. WILLIAMS. Mr. Chairman, would you yield to me before we go vote?

Mr. MARTINEZ. Yes.

Mr. WILLIAMS. I know there is a vote on. But before we walk over together, let me say to Mr. Darden and to Mr. Grandy, who noted understandably that he is not fully familiar with this issue. Those of us who have worked with it have trouble with it, too. But let us say it is 85 percent successful. That means this. You have 1,000 employees. You think 100 of them are dishonest. That means the lie detector will pick up 85 out of that 100. But, you see you give the test to all 1,000, right? So you still have 900 employees left to take the test and 135 of them are going to fail it because, it is only 85 percent effective.

So, yes, you throw your net out and you catch 85 of the 100. You let the other 15 percent go and you catch 135 suspects that are not guilty. There is the problem with an 85 percent accuracy rate. You cannot throw nets on the society. You hitch the good with the bad. And what we do in our society is say, no. We will let five innocent ones go just to be sure about the guilty, or we will let five guilty ones go to be sure about the innocent. This machine does the opposite of that and that is the problem with it.

Mr. MARTINEZ. Mr. Darden, I think that we do have to do something that is fair to all parties and I agree with your concerns, and I thank you for your testimony today.

And at that, we will take a break for 10 minutes.

[Recess.]

Mr. MARTINEZ. Since the two most important members of this committee, the Chairman and the ranking minority, are here, we will go ahead and start.

Let me introduce our first panel. Steve Markman, Assistant Attorney General, Office of Policy, Department of Justice; John F.

Berry III, M.D., Assistant Dean for Planning, Georgetown University School of Medicine, on behalf of the American Medical Association; Edward Katkin, Chair of Department of Psychology, State University of New York at Stoneybrook, on behalf of the American Psychological Association, Robert B. Fitzpatrick, Fitzpatrick and Verstegen, on behalf of the Plaintiff Employment Lawyers Association.

We will start with—Steve, would you care to begin?

Mr. MARKMAN. Thank you, Mr. Chairman and members of the subcommittee.

Mr. MARTINEZ. Steve, could I interrupt you for one minute?

Mr. MARKMAN. Yes, sir.

Mr. MARTINEZ. Your testimonies as written will be entered into the record in their entirety, and we would ask you to summarize and keep us closely, as we can, to the five minute rule.

STATEMENT OF STEVE MARKMAN, ASSISTANT ATTORNEY GENERAL, OFFICE OF POLICY, DEPARTMENT OF JUSTICE

Mr. MARKMAN. Thank you very much. I appreciate the opportunity to appear on behalf of the Department of Justice at this hearing on H.R. 1212, the proposed Employee Polygraph Protection Act.

The Department of Justice vigorously opposes federalizing the law in this area. Such action is directly contrary to the principles of federalism on which our union is based and to which this Administration is deeply committed. Until now, regulating polygraph use has been the responsibility of the states. In fact, 34 states and the District of Columbia have enacted statutes regulating the use of polygraph or other honesty tests or polygraph examiners. To preempt the states in this context where there is no evidence of an overriding need for national policy uniformity, would do violence to an important underlying principle of our union, the belief in the ability and responsibility of the states generally to govern the affairs of their citizens.

The attempt to federalize the law in this arena has implications far beyond polygraph regulation. It is symptomatic of the persistent tendency of government officials in Washington, well-meaning officials, to act as if only we can fully understand and remedy the problems confronting 240 million Americans. It is this attitude that in recent decades has been responsible for the mushrooming growth of a national government that has not only undertaken unmanageable responsibilities, but that also has usurped the decision making authority of private citizens and of the levels of government closest to those citizens, the states and their localities.

This centralizing tendency is not difficult to understand. It is not surprising that public officials and other citizens who believe that their public policy ideas are sound, want those ideas to be imposed uniformly upon the 50 states. Nor is it surprising that citizens who feel strongly about the merits of a public program want to bestow that program upon as many of their fellow citizens as possible. And it is not surprising that a business or other private entity, subject to some form of public regulation, would prefer to abide by a single regulation promulgated by Washington than to have to abide by 50 separate regulations promulgated in Sacramento and Springfield

and St. Paul. It is precisely because each of us can understand the impetus towards centralization of governmental authority that we have to be particularly careful to avoid falling victim to this tendency, and in the process undermining the constitutional balances within our system of government.

This responsibility is particularly acute given the Supreme Court's recent decision in Garcia v. San Antonio Metropolitan Transit Authority in 1985. In that case the Supreme Court held that with respect to federal regulation under the commerce power, Congress, not the federal courts, generally is the primary protector of state sovereign rights and responsibilities. In other words, the principal burden of protecting the values of federalism in the commerce context on which this bill is based lies with the members of this body.

Because of their importance to this subcommittee's decision on whether to proceed with H.R. 1212, I would call to your attention the greater discussion in my prepared statement focusing upon the fundamental values of federalism. And we touch briefly upon ideas, such as diversity and competition and trial and error, and experimentation, which we think lie at the heart of the federalism principle.

When these factors are examined in the context of polygraph regulation, the balance in this Administration's judgment is clearly struck in favor of state, not national regulation. Not only is there no need for national enforcement or uniformity with respect to private sector polygraph use, but the benefits of leaving regulation to the states are evident. Polygraph regulation is a complex issue subject to extensive ongoing debate in which a substantial number of reasonable responses are available and have, indeed, been adopted by the states.

Whether or not polygraph testing should be regulated by some level of government is not the issue here. Assuming that polygraphs are abused by private employers—and there is certainly no question that such abuse is possible—the states are as capable as the national government of recognizing and remedying any such problem. In fact, they have the greater incentive to do so since the rights of their own citizens, to whom they are immediately accountable, are involved. Approximately 70 percent of all states have already recognized the need for certain protections in this area, and have provided them through various forms of state legislation.

H.R. 1212 itself takes an inconsistent position on whether polygraph tests are sufficiently valid to be useful. While the bill would ban the use of polygraphs in the private sector, it explicitly recognizes the usefulness of polygraphs for the government by continuing to allow polygraph testing of all governmental employees. Certainly if the machines are reliable indicators of truth or falsity in the public sector, they are equally as reliable in the private sector.

Apparently, a majority of the members of the previous Congress also believed that polygraphs are useful in a variety of private sector contexts. When H.R. 1514 went to the floor on March 12 of last year, it contained a single exemption for companies involved in the storage, distribution or sale of controlled substances. One representative after another offered amendments exempting various in-

dustries from the bill's blanket prohibition. The bill finally passed the House containing not only the original exemption, but also exemptions for workers in nursing homes and children's day care centers, security personnel and public utility employees. From these exemptions, it is clear that the very representatives who have voted to bar the use of polygraphs seem to recognize their usefulness and credibility in certain contexts.

Polygraph regulation, Mr. Chairman, is an issue which requires careful balancing of the interests of consumers, employees, and employers. Possible responses range from relying on the free market, to licensing polygraph examiners, to banning completely the use of polygraphs. While all sorts of variations on these approaches are possible, which precise approach is best for any given state should be left to the citizens of that state. We see absolutely no reason to forestall the vigorous debate on this issue continuing to take place within the states.

In fact, those states that have regulated in this field have adopted widely varying approaches.

Mr. MARTINEZ. One minute to wrap up.

Mr. MARKMAN. Nineteen states and the District of Columbia regulate employers' use of the polygraph. Three states regulate employers' use of other honesty testing devices. Some of these states completely ban the use of polygraphs by private employers; others prohibit employers from requiring employees to take tests, but allow them to be administered to employees who volunteer to take them. Still others exempt certain occupations. There are a wide variety of procedures within the states.

I would like to conclude my remarks with a quote from President Reagan. In an address to the National Conference of State Legislatures, he said:

> Today federalism is one check that is out of balance as the diversity of the states has given way to the uniformity of Washington. And our task is to restore the constitutional symmetry between the central government and the states and to reestablish the freedom and variety of federalism. In the process, we'll return the citizen to his rightful place in the scheme of our democracy and that place is close to his government. We must never forget it. It is not the federal government or the states who retain the power—the people retain the power. And I hope that you'll join me in strengthening the fabric of federalism. If the federal government is more responsive to the states, the states will be more responsive to the people.

For these reasons so eloquently articulated by President Reagan, this Administration strongly urges this committee to reject this proposal.

Thank you, Mr. Chairman.

Mr. MARTINEZ. Thank you, Mr. Markman.

[The prepared statement of Stephen J. Markman follows:]

PREPARED STATEMENT OF STEPHEN J. MARKMAN, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to appear on behalf of the Department of Justice at this hearing on H.R. 1212, the proposed "Employee Polygraph Protection Act." This bill, if enacted, would prohibit private sector employers from administering polygraph examinations to employees or prospective employees.

The Department of Justice vigorously opposes federalizing the law in this area. Such action is directly contrary to the principles of federalism on which our union is based and to which this Administration is deeply committed. Until now, regulating polygraph use has been the responsibility of the states. In fact, thirty-four states and the District of Columbia have enacted statutes regulating the use of polygraph or other "honesty" tests or polygraph examiners. To preempt the states in this context, where there is no evidence of an overriding need for national policy uniformity, would do violence to an important underlying principle of our union -- the belief in the ability and responsibility of the states generally to govern the affairs of their citizens.

The attempt to federalize the law in this arena has implications far beyond polygraph regulation; it is symptomatic of the persistent tendency of government officials in Washington -- well meaning officials -- to act as if only we can fully understand and remedy the problems confronting 240 million Americans. It is this attitude that, in recent decades, has been responsible for the mushrooming growth of a national government that has not only undertaken unmanageable responsibilities, but that also has usurped the decisionmaking authority of private citizens and of the levels of government closest to those citizens -- the states and their localities. It is an attitude that is responsible for initiatives, such as Gramm-Rudman, the balanced budget and tax limitation constitutional amendments, item veto proposals and constitutional amending conventions.

This centralizing tendency is not difficult to understand. It is not surprising that public officials and other citizens, who believe that their public policy ideas are sound, want those ideas to be imposed uniformly upon the fifty states. It is not surprising that citizens who feel strongly about the merits of a public program want to bestow that program upon as many of their fellow-citizens as possible. And it is not surprising that a business or other private entity subject to some form of public regulation would prefer to abide by a single regulation promulgated by Washington than to have to abide by fifty separate regulations promulgated in Sacramento and Springfield and St. Paul. It is precisely because each of us can understand the impetus toward centralization of governmental authority that we have to be particularly careful to avoid falling victim to this tendency and, in the process, undermining the constitutional balances within our system of government.

As with many things elemental, there is a tendency sometimes to give the principles of federalism short shift. I recognize that it is not always easy to identify a bright line between those responsibilities of government that ought to be carried out by the national government and those more appropriately addressed by the states. Even in this Administration, which is deeply committed to ensuring that each level of government operates in its appropriate sphere, we have sometimes had trouble drawing that line. It is important, nevertheless, that those in the executive and legislative branch not lose sight of the inherent responsibility to confront this matter.

This responsibility is particularly acute given the Supreme Court's recent decision in Garcia v. San Antonio Metropolitan Transit Authority, 105 S. Ct. 1005 (1985). In that case, the Supreme Court held, with respect to federal regulation under the commerce power, that Congress, not the federal courts, generally is the primary protector of state sovereign rights and responsibilities. As the Court observed,

> We continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the commerce clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action -- the built-in restraints that our system provides through state participation in federal governmental action.

In other words, the principal burden of protecting the values of federalism in the commerce context lies with the Members of this body. As representatives, not only of the citizens of the states, but of the states themselves, it is the Congress that is principally vested with the responsibility to preserve the prerogatives of the states within the constitutional structure. Whatever the merits of the Court's decision in Garcia -- and this Administration opposes its holding and has supported past legislative efforts to modify the Fair Labor Standards Act in response -- its observations on the role of the Congress in upholding federalism can hardly be disputed.

Because of their importance to this Subommittee's decision on whether to proceed with H.R. 1212, I would like at this time to briefly revisit the fundamental values of federalism. The healthy respect for the states envisioned by the Framers requires that the national government pay as much attention to who should be making decisions as to what decisions should be made and that, where appropriate, it defer to the states. It was the people of the states who created the national government by delegating to that government those limited and enumerated powers relating to matters beyond the competence of the individual states. All other sovereign powers, except for those expressly prohibited the states by the Constitution, are expressly reserved to the states or the people by the Tenth Amendment.

The Framers of the Constitution set up a structure that apportions power between the national and state governments. The values that underlie this structure of federalism are not anachronistic; they are not the result of an historic accident; they are no less relevant to the United States in 1987 than they were to our Nation in 1789. In weighing whether a public function ought to be performed at the national or state level, we should consider the basic values that our federalist system seeks to ensure. Some of those principles include:

Dispersal of Power -- By apportioning and compartmentalizing power among the national and 50 state governments, the power of government generally is dispersed and thereby limited.

Accountability -- State governments, by being closer to the people, are better positioned as a general matter to act in a way that is responsive and accountable to the needs and desires of their citizens.

Participation -- Because state governments are closer to the people, there is the potential for citizens to be more directly involved in setting the direction of their affairs. This ability is likely to result in a stronger sense of community and civic

virtue as the people themselves are more deeply involved in defining the role of their government.

Diversity -- Ours is a large and disparate nation; the citizens of different states may well have different needs and concerns. Federalism permits a variegated system of government most responsive to this diverse array of sentiment. It does not require that public policies conform merely to a low common denominator; rather, it allows for the development of policies that more precisely respond to the felt needs of citizens within different geographical areas.

Competition -- Unlike the national government which is necessarily monopolistic in its assertion of public authority, the existence of the states introduces a sense of competition into the realm of public policy. If, ultimately, a citizen is unable to influence and affect the policies of his or her state, an available option always exists to move elsewhere. This option, however limited, enhances in a real way the responsiveness of state governments in a way unavailable to the national government.

Experimentation -- The states, by providing diverse responses to various issues which can be compared and contrasted, serve as laboratories of public policy experimentation. Such experimentation is ultimately likely to result in superior and in some instances naturally uniform policies, as states reassess their own and other states' experiences under particular regulatory approaches.

Containment -- Experimenting with varying forms of regulation on a smaller, state scale rather than on a uniform, national scale confines the harmful effects of regulatory actions that prove more costly or detrimental than expected. Thus, while the successful exercises in state regulation are likely to be emulated by other states, the unsuccessful exercises can be avoided.

While these values of federalism may often mitigate in favor of state rather than national action, other factors -- including a demonstrated need for national policy uniformity or for a monolithic system of enforcement -- mitigate in favor of action by the national government and must be balanced in this process. For example, the need for a uniform foreign policy on the part of the United States clearly justifies national rather than state action in this area. Similarly, in the interstate commerce area, the need for a uniform competition policy argues strongly for national antitrust law; and the need for efficient flow of interstate transportation argues for national rather than state regulation of airplane and rail safety. In other words, by federalism, we are not referring to the idea of "state's rights"; rather, we are referring to the idea expressed in the Constitution that certain governmental functions are more properly carried out at the level of the fifty states, while others are more properly carried out by the national government. Thus, it is critical that we not lose sight of the need to go through this analytic process.

When these factors are examined in the context of polygraph regulation, the balance in the Administration's judgment is clearly struck in favor of state, not national, regulation. Not only is there no need for national enforcement or uniformity with respect to private sector polygraph use, but the benefits of leaving regulation to the states are evident; polygraph regulation is a complex issue, subject to extensive ongoing debate, in which a substantial number of reasonable responses are available to (and have indeed been adopted by) the states.

Whether or not polygraphs should be regulated by some level of government is not the issue here. Assuming that polygraphs

are abused by private employers -- and there is no question that such abuse is possible -- the states are as capable as the national government of recognizing and remedying any such problem. In fact, they have the greater incentive to do so since the rights of their own citizens, to whom they are immediately accountable, are involved. As I indicated earlier, 70% of the states have already recognized a need for certain protections in this area and have provided them through various forms of state legislation.

There are a number of interests that must be balanced in determining whether or how to regulate polygraphs. For example, while certain employees may be concerned about the intrusiveness of polygraph regulation, other employees -- for example, employees falsely accused of stealing from their employers -- may desire the availability of polygraph tests in order to support their innocence.

Moreover, by protecting employees from the use of polygraph tests, employers are necessarily restricted in their use of a test that may help ensure they are hiring honest or firing dishonest employees. No one can dispute the need for identifying and discharging dishonest or thieving workers. From losses reported during a recent random sampling of three industries -- retail department store chains, general hospitals, and electronic manufacturing firms -- the National Institute of Justice estimated that business and industry lose to employee theft five to ten billion dollars annually. Not only are employers losing valuable assets and paying higher prices for theft insurance policies, but, to the extent possible, employers pass on those costs in the form of higher prices to consumers. Some of the commodities diverted -- drugs, for example -- impose their own costs on society. According to the Drug Enforcement Administration, legally produced drugs, falling in the wrong hands, kill and injure twice as many people annually as illicit drugs. DEA estimates that half a million to a million doses of drugs are stolen each year by employees of pharmacies and wholesale drug manufacturers and distributors.

Those opposed to the use of polygraphs will argue that the test is inaccurate and cannot provide employers with useful information. Certainly, the validity of polygraphs has been widely debated during the last two decades. The scientific community itself is divided. One camp, led by Prof. David C. Raskin of the University of Utah published, in 1978, a study assessing polygraphs to be 90 percent accurate, when properly conducted and evaluated. The opposing camp, led by Dr. D. T. Lykken of the University of Minnesota, claims that the test is much less accurate and that it works to screen out the most honest, most conscientious employees. As the dissenters of the House Committee on Education and Labor indicated in their report on H.R. 1524, the Employee Polygraph Protection Act of 1986, which passed the House during the last Congress, "Field studies are difficult to validate, and 'laboratory' studies cannot exactly replicate polygraph usage. The Office of Technology Assessment (OTA) in a 1983 report concluded that 'no overall measure or single, simple judgment of polygraph testing validity can be established based on available scientific evidence.'" What is essential to recognize here is, not that one side or the other has satisfied the burden of persuasion, but that the current debate is an ongoing and vigorous one.

Apart from the debate in the scientific community, a number of employers obviously believe that polygraphs are useful devices for aiding them in making responsible decisions about existing or prospective employees. According to last Congress' House Committee Report on H.R. 1524, more than two million polygraph tests are administered in the private sector each year, triple the number given ten years ago. From an economic perspective, it seems highly unreasonable to believe that employers would incur

the cost of $50-$60 per test and risk generating some bad will among valuable or potentially valuable employees, and perhaps losing them to competitors, if those employers did not believe the tests provided useful information. Moreover, it must be remembered that the alternatives to polygraph tests -- for example, background checks and personal interviews in the preemployment screening context -- may be far more highly subjective and may intrude upon privacy interests in at least as substantial a way. The value of polygraphs, therefore, should be analyzed not by some unattainable, ideal standard, but with reference to existing, real-world investigative alternatives. Again, these are considerations as to which different citizenries in different states may reasonably come to different conclusions.

H.R. 1212 itself takes an inconsistent stand on whether polygraph tests are sufficiently valid to be useful. While the bill would ban the use of polygraphs in the private sector, it explicitly recognizes the usefulness of polygraphs for the government by continuing to allow polygraph testing of all governmental employees. Certainly if the machines are reliable indicators of truth or falsity in the public sector they are equally as reliable in the private sector.

Apparently a majority of the Members of the 99th Congress' House of Representatives also believed that polygraphs are useful in a variety of private sector contexts. When H.R. 1524 went to the floor on March 12 of last year, it contained a single exemption for companies involved in the storage, distribution, or sale of controlled substances. One representative after another offered amendments exempting various industries from the bill's blanket prohibition. The bill passed the House containing not only the original exemption, but also exemptions for workers in nursing homes, and children's day care centers, security personnel, and public utility employees. From these exemptions it is clear that the very representatives who have voted to bar the use of polygraphs seemed to recognize their usefulness and credibility in certain contexts.

More than that, however, these exemptions again highlight the arbitrary nature of decisions on which occupations to exempt. If polygraphs provide benefits to employers in the armored car industry, it is difficult, if not impossible, to understand why banks (where 84% of losses are attributed to employee theft) or the legal gaming industry (where large sums of money change hands and policing of employees is extremely difficult) are not entitled to the same benefits. Likewise, if polygraphs are useful to protect employers and the public from prospective employees seeking sensitive positions involving the distribution or sale of controlled substances, they would seem to be equally useful for screening prospective employees for other sensitive positions, such as airport security personnel, employees involved with the production, utilization, and transportation of nuclear materials and truck drivers transporting munitions and other hazardous materials.

What all of this indicates is that polygraph regulation is a complex and emotional issue which poses a number of questions with no definitive answers. It is an issue which requires careful balancing of the interests of consumers, employees, and employers. Possible responses range from relying on the free market, to licensing polygraph examiners, to banning completely the use of polygraphs. While all sorts of variations on these approaches are possible, which precise approach is best for any given state should be left to the citizens of that state. We see no reason to forestall the vigorous debate on the issue continuing to take place within the states.

In fact, those states that have regulated in this field have adopted widely varying approaches. Nineteen states and the District of Columbia regulate employers' use of the polygraph:

three states regulate employers' use of other "honesty testing devices." Some of these states completely ban the use of polygraphs by private employers; others prohibit employers from requiring employees to take the tests, but allow them to be administered to employees who volunteer to take them; still others exempt certain occupations -- ranging from police and firefighters to jewelers to pharmaceutical companies -- from the ban. Six of these states additionally regulate polygraph examiners. Of those states that do not directly regulate employers' use of polygraphs, thirteen regulate polygraph examiners -- some requiring licensing, some limiting the types of questions that can be asked to employees. This diversity, with the alternatives it provides to citizens -- some of whom are vigorously opposed to polygraph use and some who are its adamant supporters -- and the ability to experiment with different approaches it allows, is one of the primary reasons the Framers of our Constitution created a two-tiered system of government, with much of the regulatory authority remaining with the states.

I would like to conclude my remarks with a quote from President Reagan. In an address to the National Conference of State Legislatures on July 30, 1981, he states:

> Today federalism is one check that is out of balance as the diversity of the states has given way to the uniformity of Washington. And our task is to restore the constitutional symmetry between the central government and the states and to reestablish the freedom and variety of federalism. In the process, we'll return the citizen to his rightful place in the scheme of our democracy and that place is close to his government. We must never forget it. It is not the federal government or the states who retain the power -- the people retain the power. And I hope that you'll join me in strengthening the fabric of federalism. If the federal government is more responsive to the states, the states will be more responsive to the people . . .

For the reasons so eloquently articulated by President Reagan, I urge that this bill not be enacted.

Mr. MARTINEZ. Before we go to Dr. Beary, let me introduce the two new members of our committee that have joined us. Major Owens from New York and our newest member to the committee from Indiana, Jim Jontz. Thank you for joining us.

Mr. JONTZ. Thank you, Mr. Chairman.

Mr. MARTINEZ. And with that, we will go to Dr. Beary.

STATEMENT OF JOHN F. BEARY III, M.D., ASSISTANT DEAN FOR PLANNING AND DEVELOPMENT, GEORGETOWN UNIVERSITY SCHOOL OF MEDICINE, ON BEHALF OF THE AMERICAN MEDICAL ASSOCIATION, ACCOMPANIED BY BRUCE BLEHART, DEPARTMENT OF FEDERAL LEGISLATION, AMERICAN MEDICAL ASSOCIATION

Dr. BEARY. Thank you, Mr. Chairman and members of the committee. I am pleased to be here today representing the AMA. And with me is Bruce Blehart from the Association's Department of Federal Legislation.

Mr. Chairman, the AMA does not support the use of the polygraph for employment purposes because the polygraph testing and scoring methods currently used in personnel screening have not been shown to be valid tests of truthfulness with a high level of predictability. The Council on Scientific Affairs studied this matter thoroughly, and we will provide this for the record.

We have heard today that there has been a great increase in the number of polygraph examinations being administered, about 2 million a year at the present time. This increase in use has arisen in spite of the fact that the scientific validity underlying the polygraph test has not been established. And my comments today will be directed at the scientific aspects.

I think the most important point to make is that there is no such machine as a lie detector, and there may never be. The theory is without scientific foundation. Basically it boils down to that there is no Pinocchio response. If you lie, your nose does not grow a half inch longer or some other unique bodily response. This point seems to have been somewhat obscured in the ten years of debate about all this. But it is a very important one to focus on.

The polygraph is an excitement detector. It is not a lie detector. It measures your heart rate and your blood pressure, things physicians are used to looking at every day in the offices and have some feeling about that. We are certainly comfortable about what that means and what it does not mean. And what it boils down to, that a person can be excited for many different reasons other than lying.

The best that the proponents can say about the polygraph is that it can provide some evidence of deception, somewhat statistically better than chance. Now, keep in mind, any of you, if you have got a quarter in your pockets, you have got a lie detector that is 50 percent accurate because there are only two choices: lying or truth-telling, heads or tails. So, you cannot get worse than 50 percent really, and the statistics are somewhat complicated.

But we'll provide for the record an article from Lancet in 1986, some JAMA reprints, January 1987, and an article from the Amer-

ican Family Physician in March '86. It is better just to look at that go over it because it is complicated to explain in oral testimony.

Now, just a few comments on the polygraph in the employment setting. The polygraph is not accurate enough to establish the ultimate proof of guilt or innocence in a criminal trial. Its use as a condition of employment is even less credible, and Mr. Williams clearly understands the statistics behind this. And you can view it as sort of having an inaccurate fire alarm. And Dr. Phillips who was involved in writing the January '87 AMA article had this to say about it. And I think this analogy lays it out rather well.

"This suggests that the polygraph is as dependable as a fire alarm that turns in nine false alarms for every true warning of a fire. However, when fire fighters arrive on the scene, they can rapidly determine if a building is on fire or not and determine whether the alarm is true or false." Unfortunately, the accused person who has fallen victim to a false alarm from the polygraph has no equally simple way to prove that he or she is really telling the truth. If they knew that, they would not be given the test, of course.

What this means in practice is that a large number of honest people will continue to be unjustly implicated as liars, criminals and traders as long as the polygraph continues to be used and trusted as a lie detector.

So, I think the AMA Council's report—the most important thrust they put on that was that there is no such machine as a lie detector, and that its use for screening is very, very poorly founded. And the Lancet article speaks more about the specifics of the false positives, the specifics of the false negatives, what prevalence, sensitivity, specificity all that means. But it is not worth spending more time at the moment.

In summary, the AMA Council for Scientific Affairs has deep concerns about this subject, encourages that good science be applied to this important area of public policy. And we stand ready to answer any questions you may have.

Mr. MARTINEZ. Thank you, Dr. Beary.

[The prepared statement of Dr. John F. Beary follows:]

STATEMENT

of the

AMERICAN MEDICAL ASSOCIATION

to the

Subcommittee on Employment Opportunities
Committee on Education and Labor
U. S. House of Representatives

Presented by

John F. Beary III, M.D.

RE: Use of Polygraph Examinations in Employment

March 5, 1987

Mr. Chairman and Members of the Committee:

My name is John F. Beary III, M.D., and I am Assistant Dean for Planning and Development, Georgetown University School of Medicine. With me is Bruce Blehart of the Association's Department of Federal Legislation.

I am pleased to appear before this Subcommittee to share with you the American Medical Association's concerns about the use of polygraph testing in the employment setting.

Mr. Chairman, the AMA does not support the use of the polygraph for employment purposes in private industry or federal agencies because the polygraph testing and scoring methods currently used in personnel screening have not been shown to be valid tests of truthfulness with a

high level of predictability. This position and testimony are based on a study by the AMA's Council on Scientific Affairs. (A copy of the full report is attached.)

Background and Present Use

The criminal justice system has long refused to recognize the validity of polygraph testing. Since the landmark decision of Frye v. United States in 1923, [293 F. 1013 (D.C. Cir. 1923)] polygraph test results have not been admissible as evidence to prove guilt or innocence in a criminal trial. Nonetheless, outside the courtroom, where a false determination of an individual's truthfulness may be just as damaging as an unjust judicial decision, our society is witnessing a rapidly growing use of the polygraph to test truthfulness.

Ten years ago, an estimated 250,000 to 400,000 polygraph examinations were being administered a year. In 1983, the American Civil Liberties Union estimated that 1 million tests a year were being given. In the federal agencies alone, over 23,000 polygraph tests have been performed. However, this great increase in the polygraph's use has arisen in spite of the fact that the scientific validity underlying the polygraph test has not been established.

Evidence of Polygraph Inaccuracy

The best that can be said about the polygraph is that it can provide evidence of deception or honesty in a percentage of people that is statistically somewhat better than if chance judgments were made. Studies indicate, however, that polygraph tests result in enough false-positive and false-negative findings of truthfulness that their

value should be thought of as not much better than the probabilities of chance in any setting -- criminal or employment.

Statistics show repeatedly that the innocent subject is much less likely to be found innocent than the guilty subject is to be found guilty in the criminal setting. In 1983, the Office of Technology Assessment (OTA) published a review of ten studies of polygraph testing in which the range of values for the percentages of correct or incorrect decisions of guilt or innocence by the examiners varied widely. In one recent study, 91.5% of guilty but only 29% of innocent subjects were correctly identified. In a more recent study, 75.1% of guilty and 63% of innocent determinations were accurate.

Examining the validity of polygraph testing is itself difficult. A primary difficulty in properly assessing the validity and reliability of polygraph testing is that the "ground truth" being sought in the testing is not always known. Although polygraph instrumentation is rather standard, another difficulty is that the structuring and the substance of the questions (depending on the purpose of the test) are central to the effectiveness of polygraph tests and require great expertise on the part of the examiners. These variables, many of which are subjective in nature, often are difficult to quantify.

Also, the skill, training, and personal abilities of the examiner, again largely subjective variables, are at issue. In one study, ten trained polygraph examiners were asked to make judgments on polygraph records of actual criminal suspects without any interaction with the subjects. Of the 1120 truth/deception judgments made by the ten

examiners, only 63.1% were correct, 35.7% were wrong, and 1.2% were inconclusive. The examiners were also asked to score the level of confidence in the judgment made in each case. Their confidence was higher for judgments of deception than for truthful decisions.

Polygraph in the Employment Setting

The polygraph test is not accurate enough to establish the ultimate proof of guilt or innocence in a criminal trial. Its use as a condition of employment is even less credible, as the few studies done concerning employment testing indicate. In fact, because questioning in the employment setting deals with more minor issues with the consequences of failure less serious than in a criminal case, it could be anticipated that the physiologic arousal of the subject might be less impressive and the deception of the examiner even easier than in a criminal case.

Most importantly, an unacceptable percentage of "innocent" persons may be labeled as "deceptive" in a polygraph screening situation in which most of those screened were truthful. It has been estimated that, even if the results of the polygraph testing were 95% valid and the predictive value was 50%, in a screened population of 1000 in which 5% were guilty of some transgression, 47 of the 50 guilty people would be apprehended but 47 innocent people would also be labeled as guilty.

Thus far, studies on the polygraph testing techniques used in the employment setting are few, and their scientific validity is certainly no better than in the criminal investigation. In five analogue studies of one common technique used in employment testing, the correct determination of guilt ranged from 60% to 87% and of innocence from 42%

to 91%. In a review of another technique, the accurate determination of guilt was 60% to 95% and of innocence was 80% to 100%. From these results, it is fair to conclude that the kinds of techniques used in the employment setting are plagued with the same problem of false identification of innocent subjects as in the criminal setting. However, the consequences could be far more damaging. In comparison to the criminal setting where decisions on probable cause and other evidentiary considerations have probably been made before a polygraph test is given, employee subjects are typically not so narrowly selected. There is a far greater likelihood that innocent subjects will be falsely identified in the employment setting.

Conclusion

Mr. Chairman, it is well established that the polygraph can recognize guilty subjects with an accuracy of between 60% and 95% in the criminal setting, which is somewhat better than chance. However, there is a significant rate of false-positive and false-negative determinations of deception so that the polygraph test should never be the sole arbiter of guilt or innocence in any setting.

The use of the polygraph test in applications other than criminal investigation, most importantly in the employment setting, has not been adequately studied. In those few studies reported on noncriminal subjects, a wide range of false-positive and false-negative results has been reported, which is similar to that found in the criminal setting. Those results suggest too low a predictability for serious consideration of the polygraph test's use in the employment setting. Not only is there

a significant false-positive rate, which would misclassify some innocent, truthful subjects as deceptive, but many countermeasures have been used -- sometimes with reproducible success -- to fool the polygraph examiner.

Unless polygraph testing and its scoring as currently used in personnel screening can be shown to be valid with a high level of predictability, the AMA does not support the use of the polygraph in industry or in federal agencies as a preemployment test. The AMA recommends that research to a much greater extent than is now planned should be supported and conducted if testing for employment purposes (including security clearances) is to be considered.

Mr. Chairman, we would be pleased to address any questions the Committee may have.

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Council Report

Polygraph

Council on Scientific Affairs

The American Medical Association (AMA) Council on Scientific Affairs has reviewed the data on the validity and accuracy of polygraph testing as it is applied today. The use of the control question technique in criminal cases is time honored and has seen much scientific study. It is established that classification of guilty can be made with 75% to 97% accuracy, but the rate of false-positives is often sufficiently high to preclude use of this test as the sole arbiter of guilt or innocence. This does not preclude using the polygraph test in criminal investigations as evidence or as another source of information to guide the investigation with full appreciation of the limitations in its use. Application of the polygraph in personnel screening, although gaining in popularity, has not been adequately validated. The few limited studies that have been performed suggest no greater accuracy for the types of testing done for this purpose than for the control question polygraph testing used in criminal cases. The effect of polygraph testing to deter theft and fraud associated with employment has never been measured, nor has its impact on employee morale and productivity been determined. Much more serious research needs to be done before the polygraph should be generally accepted for this purpose.

(*JAMA* 1986;256:1173-1175)

THE POLYGRAPH is a combination of instruments that records a subject's blood pressure, pulse, respirations, and galvanic skin resistance while a series of questions are posed. In a pretest process, the examiner asks a series of questions to evaluate the voluntary subject (suspect), obtains an informed consent, derives necessary background information, and establishes the kind of relationship that facilitates the test by putting the subject at ease and stabilizing the parameters being measured. Finally, the formal questioning is begun. The subject is given a series of carefully formulated questions: the relevant questions dealing with the issue at hand, irrelevant questions, and control questions. The latter are designed to create the probability that the subject will lie or at least be unsure of the truth of his answer. By comparing the magnitude of responses to relevant and control questions with those to irrelevant questions, the examiner makes an interpretation on the truth, falsity, or inconclusive nature of each response. This is called the "control question technique."

In other applications (eg, federal security and preemployment testing), control questions, relevant/irrelevant questions, or the techniques of concealed information, guilty knowledge, and peak of tension tests are employed. In each of these last techniques, questions are targeted with a different intention than in the control question technique. Thus, although instrumentation is rather standard, it is the structuring and the substance of the questions, depending upon the purpose of the test, that require great expertise and that are central to the effectiveness of the tests. The control question technique has been used for criminal testing and has seen the greatest study.

These "lie detector" tests have been offered in court as evidence since the 1920s. However, in 1923 in the landmark case of *Frye vs United States* (233 F 1013 [DC Cir 1923]), it was stated that "the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, developments, and experiments thus far made." Even after 60 years, this doctrine is still quoted widely in the courts. However, employers are increasing their use of the polygraph to screen prospective employees and workers to determine union sympathies and other attitudes. Even ten years ago, 250 000 to 400 000 polygraph tests were being given per year; in 1983, the American Civil Liberties Union estimated that 1 million tests a year were being performed. In 1982, there were an estimated 3000 polygraph examiners in the United States, and in the federal agencies alone, 23 000 polygraph tests have been performed.[1]

A National Security Decision Directive 84 (presidential directive, March 11, 1981) authorized executive agencies and departments to require that employees take a polygraph test in investigation of "leaks" of classified information to the media. On Oct 19, 1983, the Department of Justice announced that administration policy would also permit government-wide polygraph use for preemployment clearance and other screening of employees, and the Department of Defense has authorized its use in security screening of employees with access to highly sensitive material. Nevertheless, it is important to recognize that, even though such application may be helpful

From the Council on Scientific Affairs, American Medical Association, Chicago.

Report G of the Council on Scientific Affairs, adopted by the House of Delegates of the American Medical Association at the 1984 Interim Meeting.

This report is not intended to be construed or to serve as a standard of medical care. Standards of medical care are determined on the basis of all of the facts and circumstances involved in an individual case and are subject to change as scientific knowledge and technology advance and patterns of practice evolve. This report reflects the views of scientific experts and reports in the scientific literature as of December 1984.

Reprint requests to Council on Scientific Affairs, American Medical Association, 535 N Dearborn St, Chicago, IL 60610 (William R. Hendee, PhD).

Members of the Council on Scientific Affairs are as follows: John R. Bean, MD, Philadelphia, Vice-Chairman; Stefano Bertuzzi, Cambridge, Mass; Medical Student Representative; George M. Bumgarner, MD, St Louis; E. Harvey Estes, Jr, MD, Durham, NC; Ira R. Hardy, MD, Chicago, Resident Representative; John H. Mabry, II, MD, Los Angeles, Chairman; William C. Scott, MD, Tucson; Joseph H. Skom, MD, Chicago; James B. Snow, Jr, MD, Philadelphia; Richard M. Weinshel, MD, Cleveland; and Jack P. Strong, MD, New Orleans, Henry J. Wagner, Jr, MD, Baltimore; William R. Hendee, PhD, Secretary; William T. McGivney, PhD, Assistant Secretary; and Richard J. Jones, MD, Past Secretary, Primary Author).

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to the agency, the scientific validity underlying the polygraph test has not yet been established for these purposes.

VALIDITY OF POLYGRAPHY

There is a large amount of experimental psychological literature that examines many physiologic variables of subjects who, under experimental conditions, are asked about a mock crime they may have committed or about certain knowledge they may have been given and told to deny. This type of controlled analogue study may be very important in studying the reproducibility of test methods, examining the parameters most sensitive to deception, and generally defining the limits of the method; however, such studies can only provide a weak simulation of the real-life situation in which perhaps less scientifically motivated examiners are testing people who have been accused of serious crimes. Experienced examiners have claimed that a subject's behavioral cues can often enhance the likelihood of recognition of a deception. It has been shown in the experimentally controlled mock crime situation that an attentive examiner can detect such cues with a frequency that statistically is significantly higher in the untruthful group than in the truthful.

The difficulty in properly assessing the validity and reliability of polygraphy is partly because the "ground truth" is not always known, on the one hand, and the skill and training of the examiner may be at issue on the other. In one interesting study, field-trained polygraph examiners were asked to make blind judgments on polygraph *records of* 112 criminal suspects drawn from verified and unverified previous police investigations.[2] Half of the records had been verified (ie, ground truth was known through a confession); in the other half, the suspect had finally been judged truthful or deceptive by the original polygraph examiner. Cases were also divided between crimes against persons and crimes against property and between truthful and deceptive; thus, 14 sets of polygraph records were examined in each of eight categories. It is emphasized that only the records were examined; the ten examiners had no interaction with the subjects themselves.

In total, ten examiners made 1120 truth/deception judgments. Of these, 63.1% were correct, 1.2% were inconclusive, and 35.7% were wrong. There were no significant differences for verified or unverified records, for crimes against persons or property, or for evaluations by experienced and less experienced investigators. The examiners were asked to score the level of their confidence in the judgment made in each case. It was higher for deception than for truthful decisions. They also made more false-positive errors and fewer false-negative errors in records based on crimes against persons than on those against property, which suggests that crimes against persons may elicit a stronger physiologic reaction. In this study, true-positive judgments of deception averaged about 77% accurate, whereas true-negative judgments (against deception) were only 51% accurate.

The Office of Technology Assessment (OTA) review considered the outcome of validity measurements in ten such field studies that met their minimum criteria for scientific rigor: a reasonable basis for "ground truth," ie, a confession or the judicial outcome, was known. The range of values for the percentages of correct or incorrect decisions of guilt or innocence varied widely. In one recent study, 91.5% of guilty but only 29% of innocent subjects were correctly identified (52.9% false-positives and 17.6% inconclusive).[3] In a more recent study, 75.1% of guilty and 63% of innocent determinations were accurate, the remainder being false-positive guilty (25.0%) and innocent (37%) decisions.[4] Thus, it can be concluded that, although the polygraph can provide evidence for deception or honesty in a percentage of people that is statistically better than chance, there are enough false-positives and false-negatives to make many applications, perhaps even in criminal cases, of dubious value.

PERSONNEL SCREENING AND PUBLIC POLICY USES

It is obvious that the polygraph is not yet sufficiently accurate to establish the ultimate proof of guilt or innocence in a criminal trial. Its use as a condition of employment to establish national security clearance, determine union sympathies, or detect employees guilty of theft, breach of confidence, or other misconduct has become widespread; however, the few studies that have been done suggest that the techniques employed are no more accurate than the control question method discussed above. In fact, because the questioning deals with more minor issues and the consequence of failure is less serious than in a criminal case, it could be anticipated that the physiologic arousal of the sympathetic system might be less impressive and the deception of the examiner even easier than in a criminal case. Furthermore, the application of the polygraph test to a group, most of whom are certainly innocent, may frighten some into more careful and truthful answers but will also lead to a low level of predictability with a large number of false-positive results.

The erosion of employee morale and the risk of employer liability may not be worth the possible benefits of uncovering a disloyal employee. Furthermore, an unacceptable percentage of "innocent" persons may be labeled as "deceptive" in a polygraph screening situation in which most of those screened were truthful. It has been estimated that, even if the results of the polygraph testing were 96% valid and the predictive value was 50%, in a screened population of 1000 in which 5% were guilty of some transgression, 47 of the 50 guilty people would be apprehended but 47 innocent people would also be labeled as guilty.[1] These calculations, although based on reasonable estimates from the experience in the field with criminal testing, may be too optimistic. Most potential employees are not under the same duress as a criminal on trial and, thus far, studies on the field techniques used in such applications are few and their scientific validity is no better than in the criminal investigation.

There have been no adequate field trials of the techniques now used for personnel screening, although analogue studies of the validity of some of the techniques used have been performed. The zone of comparison test and the modified general question test are based on the same premises and share the underlying rationale of the control question technique. Another format of questioning includes concealed information tests to detect whether the subject has information about a crime that only a guilty subject would have. It may take the form of a guilty knowledge test (GKT) or the peak of tension (POT) test.

In the GKT, there is a larger series of questions that may be of the multiple-choice type as opposed to "yes" and "no" or true and false, and they focus on specific details known only to the perpetrator of the guilty act. In the POT test, five to nine nearly identical questions are asked to which the subject is instructed to answer "no." The critical question is placed in the middle of the series, so that the physiologic response will build up to a peak at that point (if there is guilty knowledge) and then fall back down again as the questioning continues.

Analogue studies on students or oth-

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er experimental subjects under controlled conditions have been reviewed.[1] In five studies of control question testing, the correct determination of guilt ranged from 60% to 87% and of innocence from 42% to 91%. Inconclusive results ranged from 5% to 44%, and false-negative (incorrect) results for the innocent ranged from 2% to 17% (average). In a review of five of the GKT analogue studies (which were not truly comparable in design), the accurate determination of guilt was 60% to 96% and of innocence was 80% to 100%. In these studies, an incorrect classification of guilty was made in 8% to 40% of subjects (average, 20%) and misclassification of the innocent as guilty averaged about 5%. Thus, it is fair to conclude that the concealed information tests are plagued, if perhaps less severely, with the same problem of false identification of innocent subjects.

The only analogue study that comes close to applying the control question technique tested military intelligence personnel in preemployment examinations.[1] Volunteers from the intelligence community were asked to respond to a series of questions on date and place of birth, educational history, employment, and residence information. Half of the subjects were told to give certain false information and were offered a reward if they could fool the examiner. Using a zone of comparison technique, the greatest control method, and the relevant/irrelevant technique, the identification of truthful subjects was accurate in 62% to 77% and incorrect in 15% to 23%; in 4% to 19%, the results were inconclusive. Thus, it can be concluded that a great variation in accuracy of classification and a substantial misclassification of truthful subjects occur regardless of the technique employed.

FACTORS AFFECTING POLYGRAPH VALIDITY

Because of the relatively high incidence of false-positive results, many students of polygraphy have tried to improve its accuracy by allowing for, or even eliminating, certain factors that have been shown to impact upon the test's validity. Others have studied countermeasures that might be successful in helping the suspect to defeat the test system. These factors may be broken down into operator characteristics, test subject characteristics, the setting for the test, and external influences. These have been reviewed at length in the OTA report; thus, only selected factors are listed here for the sake of brevity.

Operator Characteristics

Experience.—In one study, assessments made by experienced operators were shown to have a higher validity (91.4%) than those of interns being trained in the questioning technique (77.5%).[5]

Type of Training.—Objective scoring techniques (perhaps by computer) vs subjective analysis of responses need to be studied further to determine the most effective modality.

Selection of Polygraph Trainees.—This factor may play a role not yet identified.

Subject Characteristics

Gender.—Most testing has been done in males; there are few comparisons that might establish applicability of findings to females.

Psychopathy.—Guilty psychopaths may escape detection because they are not concerned about their misdeed; however, this has not been convincingly established by experimental or field trial.

Intelligence.—This factor may play a role in the subject's motivation to deceive or in enhancing the probability of detection, but requires further study.

Ethnic and Group Differences.—These may affect validity but have not been studied; however, the impact of ethnic biases on the subjective interpretations made by the examiner cannot be easily excluded.

Autonomic Lability.—The possibility that some individuals may be subject to easy autonomic arousal and others to late arousal seems very likely, but the extent to which this may mislead examiners requires further study. It appears that changes in ectodermal resistance may be less subject to individual variation than cardiorespiratory responses.

The Test Setting

Belief in the Test.—How much credence an individual being tested places on the polygraph method may determine his decision to try to "beat the machine."

Threat of Punishment.—The more certain that a guilty response will bring serious consequences, the more likely that the outcome is valid. This is the main hypothesis that is being exploited in each polygraph study and may explain some differences between field and analogue studies.

Instrumental Activity.—There is experimental evidence that subjects aware of being recorded have more intense responses to relevant questions, but not to control questions, than they did when they thought they were not being recorded.[1]

Test Location.—Although location of the test is generally felt to be very important, the impact upon validity of whether the test is administered in a special facility or in a room has not been determined.

Extraneous Factors

Physical Activity.—Tensing of muscles was shown to reduce the likelihood of detection from 75% to 10% in one experiment.[6] Other investigators have not always confirmed this, but most have shown that an inconclusive result is easily provoked by such a countermeasure.

Drugs.—Meprobamate has been shown to suppress autonomic activity and facilitate deception,[7] although studies utilizing diazepam or methylphenidate have not borne this out as a general finding for all antianxiety agents. β-Blockade has resulted in an increase in the rate of "inconclusive" tests, even though the overall error rate was not affected. Much more study of the effects of caffeine, alcohol, and psychoactive drugs is needed.

Hypnosis, Biofeedback.—In one isolated study, both hypnosis and biofeedback groups reduced detectability of deception (after training) to less than that in a control group.[8] However, other studies have suggested that hypnosis is not an effective countermeasure to prevent detection.

Mindset.—Trained individuals who are familiar with the polygraph technique should be able to differentiate between relevant, irrelevant, and control questions. This would improve the possibility of "beating the polygraph test" through cognitive countermeasures. This possibility has not been adequately explored, although, in one preliminary report, subjects who have been coached and tested repeatedly are better able to avoid detection.[9]

Efforts to develop an objective computerized scoring system may have merit, but, in the opinion of most examiners, the subjective input of the examiner in the formulation of questions and in their application remains the critical point of the test as it is used today. Use of the control question technique has been well studied in criminal investigations, and its ability to detect guilt in crimes against person or property is fairly well defined. Nevertheless, false-positive and false-negative results suggest that one must always be left with some doubt in the final determination of guilt or inno-

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cence. When the application is changed to preemployment screening or a security clearance, there is substantial evidence that results will not be scientifically acceptable. This is partly because of the purposes of the test, which require significant variations in the questioning techniques used—zone of comparison, POT test, and GKT. These techniques have not been studied sufficiently in the field to determine the true incidence of recognition and predictability of the test results and the success of recommended countermeasures.

SUMMARY

The polygraph instrument records a subject's blood pressure, pulse, respiration, and galvanic skin resistance. In a polygraph test, the variations in these parameters are recorded as the subject responds to a series of questions that are relevant or irrelevant to a specific issue or action under review or are control questions. When the relevant questions are focused on an alleged criminal act, this becomes the control question technique that is used in examination of a suspect criminal. It is well established that the polygraph can recognize guilty suspects with an accuracy (60% to 96%) that is better than chance. However, there is a significant rate of false-positive and false-negative determinations of deception so that the polygraph test alone can never be the sole arbiter of guilt or innocence. So far, this has been largely appreciated by the courts.

Criminal investigation has often benefited from polygraph usage because the investigator can focus on the incident in question, using it as the basis for selecting relevant and control questions in the application of the test, in the full knowledge that the detection of deception will not be absolutely accurate. Sometimes the simple threat of a "lie detector test" may facilitate the obtaining of a confession. At other times, the course of further investigation may be more easily plotted.

The use of the polygraph test in applications other than criminal investigation—for security clearance, preemployment screening, determination of paternity, periodic testing for thievery or disloyalty, cheating on examinations, and the like—has never been adequately studied. In those few studies of the validity of the testing technique that have been reported on noncriminal subjects (using modifications of control question technique), a wide range of false-positive and false-negative results, similar to that found in criminal investigations, has been reported and suggests too low a predictability for serious consideration of this application.

Aside from issues of invasion of privacy, self-incrimination, and impairment of personal dignity, it must be conceded that the polygraph test is not yet reliable enough to be the sole arbiter of guilt or innocence in a criminal trial. It has not been shown to be any more accurate when applied to personnel screening for governmental or private employers. Not only is there a significant false-positive rate, which would misclassify some innocent, truthful subjects as deceptive, but many countermeasures have been used—sometimes with reproducible success—to fool the polygraph examiner. The recent review by the OTA concluded "that there is only limited scientific evidence for establishing the validity of polygraph testing. Even where the evidence seems to indicate that polygraph testing detects deceptive subjects better than chance . . . significant error rates are possible, and examiner and examinee differences and the use of countermeasures may further affect validity."[1]

CONCLUSIONS AND RECOMMENDATIONS

The Council offers the following conclusions:

1. In considering the scientific validity of polygraphy, one must consider the purpose of the test and the type of questioning technique employed. Each application must be examined individually.

2. Although the control question technique has been carefully studied in the context of a criminal investigation, where its limitations have been fairly well defined, the validity of this or other more commonly used techniques for personnel screening has not been adequately studied.

3. Those studies that may have some analogy to the use of the polygraph in personnel screening have demonstrated similar high levels of false-negative and false-positive classifications of innocent and guilty subjects that impair the use of the polygraph in criminal investigation.

4. The success of several countermeasures to prevent detection of deception has been legendary, yet serious scientific study of such countermeasures, such as tensing certain muscle groups, has been quite limited.

5. The possible savings in control of employee fraud and theft that might be accomplished by polygraph screening has not been examined in any scientifically valid study, nor has any investigator adequately examined the possible impact of polygraph screening on employee morale and productivity.

6. In screening tests applied to a large work population, predictability depends on the incidence of true-positive test results in that population but also on the false-positive and false-negative test results. This means that even with a test of 95% accuracy in a population containing few guilty subjects, an unacceptable number of truly negative (truthful) subjects can be misclassified as positive (deceptive).

The Council on Scientific Affairs, in view of these conclusions, makes the following recommendations:

1. Until polygraph testing and its scoring as currently used in personnel screening can be shown to be valid with a high level of predictability, the AMA should not support the use of the polygraph in industry or in federal agencies as a preemployment test.

2. The AMA should also recommend that, when any federal agencies believe that such polygraph screening tests are both ethically acceptable and administratively necessary for security clearance, much more research than is now planned on this specific application should be supported and conducted.

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Mr. MARTINEZ. Mr. Katkin?

STATEMENT OF EDWARD S. KATKIN, PH.D., CHAIR, DEPARTMENT OF PSYCHOLOGY, STATE UNIVERSITY OF NEW YORK AT STONEYBROOK, ON BEHALF OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION

Mr. KATKIN. Thank you, Mr. Chairman, members of the committee.

On behalf of the American Psychological Association, an organization representing 870,000 psychologists who work as researchers and practitioners, I am pleased to appear in support of H.R. 1212. I am currently a professor of psychology at the State University of New York at Stoneybrook, and also the Chairman of Executive Committee of the Council of Graduate Departments of Psychology, an organization that represents virtually all of the accredited psychology graduate degree granting programs in the United States. In addition, in 1983 I was the chairman of the Scientific Advisory Panel that oversaw the preparation of the congressional OTA report on the validity of polygraph testing.

The American Psychological Association supports the bill to prohibit the use by private employers of polygraph test for employment screening. In January 1986 our governing body, the Council of Representatives, passed a resolution which addressed the issued raised by this legislation. The Council of the APA expressed great reservations about the use of polygraph tests to test deception. The council noted that "despite many years of development of the polygraph, the scientific evidence is still unsatisfactory for the validity of psychophysiological indicators to infer deceptive behavior. Such evidence is particularly poor concerning the polygraph use in employment screening."

The heart of psychologists' concerns about polygraphy is the fact that it is a psychological test, yet its use does not conform to accepted standards for educational and psychological testing. According to the American Psychological Association's published test standards, tests should only be used when sufficient data on their reliability and validity for a particular population exist. There are no data for the validity of polygraph tests in employment screening. In such cases, polygraph tests are typically use to screen large numbers of employees for their honesty. Other than anecdotal data, we have no basis to assume such tests to valid. None of the fundamental test validity criteria are met by such applications of psychophysiological measurement techniques.

Furthermore, as Dr. Beary pointed out, there is no evidence that any physiological response pattern is associated uniquely with deception. As such, it is unlikely that a test constructed in the form of present employment screening polygraph tests can be validated. Although there is certainly legitimate research interest in polygraph testing, and there may be applications of such testing that can be validated, in the absence of such data, psychologists are ethically prohibited from employing such test methods.

Now, one major problem with polygraph testing in employment situations is that only a relatively small number of tested individuals are likely to be deceptive. Most American workers are honest

and will respond accurately to any questions about their past or present work related behavior. The polygraph test in such situations is being called upon to pick a need out of a haystack. Even if one can assume reasonably high degrees of accuracy, when base rates are low, there is the possibility of great damage to innocent persons who are labeled as deceptive.

As Congressman Williams pointed out, assuming an 85 percent accuracy rate on testing 1,000 hypothetical people, you are going to wind up with 61 percent of the identified suspects as being labeled as deceptive. If we translate that 61 percent into the 2 million polygraph tests that were given last year, what you would discover is that given an 85 percent accuracy rate, and let's assume a base rate of 10 percent actual dishonesty among people screened—and that is probably high—440,000 suspects would have been identified of whom 268,000 would have been innocent.

Now, it can be shown mathematically—and I will be happy to take the time if someone wants—that if the validity of the test drops below 85 percent, then the misidentification rate increases. Similarly, if the base rate of dishonesty is less than 10 percent, and it most likely is, the misidentification rate increases. It is obvious that in the employment screening situation, it is a mathematical given that the majority of identified suspects are, in fact, innocent.

This misidentification of honest individuals is referred to as the false positive rate and is of great concern to scientists and those who have studied polygraph testing. False positives result not only when the base rate of dishonesty is low, but on any type of test.

The tenuous nature of the theory underlying the test and the lack of data are only two of the problems. It is also clear that those giving polygraph tests often have limited training and expertise in psychology and the interpretation of psychophysiological measures. Individuals can become polygraph operators with only a few weeks of training. Such individuals lack even a superficial knowledge base in psychological testing and interpretation. Those who are serious students of human behavior, however, view their responsibilities somewhat differently. In essence, the position of the American Psychological Association is that the problem is far more complex than is suggested by the technology now used in the employment context.

Now, we recognize that there is an alternative bill proposed to regulate the polygraph industry rather than to restrict it. The American Psychological Association opposes such legislative proposals. Nothing in the substitute bill would require that the tests to be given adhere to even minimal standards of reliability and validity. In fact, the bill would be regressive and would allow the use of tests for which validity data are clearly negative, such as the voice stress analyzer.

Mr. MARTINEZ. One minute.

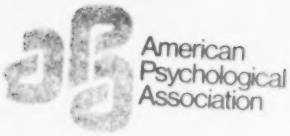
Mr. KATKIN. I should point out here that the APA in general favors regulation of professional practice. But it believes that such regulation should apply to professions in which there is a scientifically sound basis for practice and in which there are clearly established criteria for professional training.

When this bill was considered in the 99th Congress, a number of exemptions were accepted which would have allowed the continued

use of polygraph testing in several specific industries. The granting of such exemptions is contrary to the weight of scientific evidence. In the settings designated for exemption, the consequences of misidentifying both honest and dishonest individuals are even more severe than in other settings. It is possible that in nuclear plants or in child care settings, for instance, the motivation of dishonest workers to learn how to defeat the test is strongest, and the concern of among honest workers about the test is highest.

My final comment is that the application of polygraph testing and its ultimate reliability and validity is a subject for intensive future research. And we hope that the current basic research agencies of the United States government, such as the NSF and the NIH, will see fit to continue funding basic research in the scientific validity of the technique. Thank you very much.

[The prepared statement of Edward S. Katkin follows:]



TESTIMONY OF

Edward S. Katkin, Ph.D.

on behalf of

AMERICAN PSYCHOLOGICAL ASSOCIATION

before the

SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES

COMMITTEE ON EDUCATION AND LABOR

UNITED STATES HOUSE OF REPRESENTATIVES

on the subject of

H.R. 1212

EMPLOYEE POLYGRAPH PROTECTION ACT

March 5, 1987

Honorable Matthew G. Martinez
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Washington, D.C. 20036
(202) 955-7600

On behalf of the American Psychological Association, an organization representing 87,000 psychologists who work as researchers and practitioners, I am pleased to appear in support of H.R. 1212. I am a Professor of Psychology and Chairman of the Psychology Department at the State University of New York at Stony Brook. I am currently the Chairman of the Executive Committee of the Council of Graduate Departments of Psychology (COGDOP), an organization that represents virtually all of the accredited Psychology graduate degree granting programs and departments in the United States. I am also a member and past-president (1983-1984) of the Society for Psychophysiological Research, an international organization of psychologists, physicians, and biomedical engineers dedicated to the scientific study of the relationship between physiology and behavior. In 1983, I was the Chairman of the Scientific Advisory Panel that oversaw the preparation of the Congressional Office of Technology Assessment report on the validity of polygraph testing.

The American Psychological Association (APA) supports the bill to prohibit the use by private employers of polygraph tests for employment screening. In January, 1986, our governing body, the APA Council of Representatives, passed a resolution which addresses the issues raised by this legislation. The Council of APA Representatives expressed "... great reservations about the use of polygraph tests to test deception". The Council noted that "...despite many years of development of the polygraph,

the scientific evidence is still unsatisfactory for the validity of psychophysiological indicators to infer deceptive behavior. Such evidence is particularly poor concerning the polygraph use in employment screening...".

This resolution received near-unanimous support from the Council, after it was reviewed by groups including prominent psychologists involved in research and practice from nearly every area of the country. In addition, the resolution had input from virtually all of the psychologists who have been active in relevant research and use of polygraph tests.

Concerns about Polygraph Tests

At the heart of psychologists' concerns about polygraphy is the fact that it is a psychological test, yet its use does not conform to accepted Standards for Educational and Psychological Testing. According to APA's published Test Standards, polygraph tests should only be used when sufficient data on their reliability and validity for a particular population exist. There are no data for the validity of polygraph tests in employment screening. In such cases, polygraph tests are typically used to screen large numbers of employees for their honesty. Other than anecdotal data, we have no basis to assume such tests to be valid. None of the fundamental test validity criteria are met by such applications of psychophysiological measurement techniques. Furthermore, there is no evidence that any physiological response pattern is associated uniquely with

deception. As such, it is unlikely that a test constructed in the form of present employment screening polygraph tests, can be validated. Although there is certainly legitimate research interest in polygraph testing and there may be applications of such testing that can be validated, in the absence of such data psychologists are ethically prohibited from employing such test methods.

Low baserate of deception. One major problem with polygraph testing in employment situations is that only a relatively small number of tested individuals are likely to be deceptive. Most American workers are honest and will respond accurately to any questions about their past or present work-related behavior. The polygraph test, in such situations, is being called upon to "pick a needle from a haystack". Even if one could assume reasonably high degrees of accuracy, when baserates are low there is the possibility of great damage to innocent persons who are labeled as deceptive.

For example, assume that polygraph tests are 85% accurate, a fair assumption based on the 1983 OTA report. Consider, under such circumstances, what would happen in the case of screening 1000 employees, 100 of whom (10%) were dishonest. In that situation, one would identify 85 of the dishonest employees, but at the cost of misidentifying 135 (15%) of the honest employees. As you can see, in this situation the polygraph tester identifies 220 "suspects," of whom 61% are completely innocent. It can be shown mathematically that if the validity of the test drops below

85%, then the misidentification rate increases. Similarly, if the baserate of dishonesty is less than 10%, and it most likely is, the misidentification rate increases. It is obvious that in the employment screening situation it is a mathematical given that the majority of identified "suspects" are in fact innocent!

This misidentification of honest individuals is referred to as the false positive rate and is of great concern to scientists and those who have studied polygraph testing. False positives result not only when the base rate of dishonesty is low, but on any type of polygraph test.

Examiner training. The tenuous nature of the theory underlying the test and the lack of data are only two of the problems. It is also clear that those giving polygraph tests often have limited training and expertise in psychology and the interpretation of psychophysiological measures. Individuals can become polygraph operators with only a few weeks of training. Such individuals lack even a superficial knowledge base in psychological testing and interpretation. Those who are serious students of human behavior, however, view their responsibility somewhat differently. In essence, the position of the American Psychological Association is that the problem is far more complex than is suggested by the technology now used in the employment context.

Regulation

We recognize that an alternative bill has been proposed to regulate the polygraph industry rather than restrict it. The American Psychological Association opposes such legislative proposals. Nothing in the substitute bill would require that the tests to be given adhere to even minimal standards of reliability and validity. In fact, the bill would be regressive and allow the use of tests for which validity data are clearly negative, such as voice stress analyzers. I should point out here that the APA, in general, favors regulation of professional practice, but it believes that such regulation should apply to professions in which there is a scientifically sound basis for practice, and in which there are clearly established criteria for professional training.

Exemptions

When this bill was considered in the 99th Congress, a number of exemptions were accepted which would have allowed the continued use of polygraph testing in several specific industries. The granting of such exemptions is contrary to the weight of scientific evidence. In the settings designated for exemption, the consequences of misidentifying both honest and dishonest individuals are even more severe than in other settings. It is possible that in nuclear plants or in child care settings, for instance, the motivation of dishonest workers to learn how to defeat the

test is strongest and the concern of honest workers about the test is highest.

Research

The emphasis of this discussion on the problems of the application of polygraph testing should not be used as an excuse to avoid research. In fact, our description of the complexity of polygraph testing signifies the importance of continued basic and applied research on the psychology of deception. We have jumped too quickly into the development and diffusion of a technology that has a limited conceptual and empirical foundation. More research, funded by agencies such as NSF and NIMH, that do not already have a commitment to maintaining the technology, is desperately needed.

Mr. MARTINEZ. Thank you, Mr. Katkin.
Mr. Fitzpatrick?

STATEMENT OF ROBERT B. FITZPATRICK, FITZPATRICK & VERSTEGEN, ON BEHALF OF THE PLAINTIFF EMPLOYMENT LAWYERS ASSOCIATION

Mr. FITZPATRICK. Thank you, Mr. Chairman and members of the subcommittee.

The Plaintiff Employment Lawyers Association appreciates the opportunity to testify on the Employee Polygraph Protection Act. My name is Robert Fitzpatrick and I am a member of the National Executive Board of PELA, whose members specialize in the representation of individual employees.

I appear today to endorse the passage of legislation to prohibit the use of polygraphs in the work place. As we approach the decade of the Nineties, it is time to put the polygraph machine in a display case at the Smithsonian Museum as an example of 20th Century witchcraft. American employers who use polygraphs do a disservice to themselves and to our great nation as a whole by allowing these machines to brand employees as liars and thieves. By doing so, they besmirch our nation's great heritage of fairness and due process.

Federal legislation abolishing the use of polygraphs in the work place is long overdue. Federal legislation eliminating their use can restore dignity to the work place and end the reign of terror that persists in all too many work sites. Historically the courts, which have had to grapple with the reliability of the polygraph machine, have denied its admission into evidence.

I will not belabor the subcommittee with a comprehensive analysis of the law on the subject, but would refer you to a report done by the Bureau of National Affairs on the use of the polygraph in the work place where the BNA sets out most of the leading cases in the federal and the state courts.

I did a check of the jurisdictions of the old subcommittee. I apologize that I did not check the jurisdiction of some of the new members, but based upon the old head count in all of those jurisdictions except two, the polygraph is not admitted into evidence. In the other two, it may only get into evidence if all parties stipulate that it can be admitted.

I note in Mr. Gunderson's jurisdiction, Wisconsin, that for seven years it was allowed into evidence until the Wisconsin Supreme Court, after seven years of experience, changed its mind and said henceforth no more. The polygraph will not be admitted into evidence even if there is a stipulation.

The PELA has several concerns about H.R. 1212 as written. We shall submit a detailed analysis of the bill for your consideration. I would like to address several of our concerns today.

First, this ban should not be limited to the private sector. Public servants should not be treated as second class citizens. PELA urges the subcommittee to expand the protections to all employees, state, federal and local.

Second, it should be made explicit that employees and job applicant rights under the law cannot waived, as is done in the State of

Michigan by state law. Hopefully, such language in this law would go a long way towards eliminating the common practice on the part of employers in the states where polygraphs are already regulated of obtaining consent forms from their employees. Those consent forms are inherently coercive.

Third, the notice required by the act should include a requirement like in the State of Maryland that a notice be printed on the job application to the effect that a polygraph cannot be administered to a job applicant or an employee.

Fourth, the law's remedy should be made explicit to avoid endless wrangling between lawyers over congressional intent. The law as written provides for legal and equitable relief in the private cause of action provided for. Legal relief includes damages for emotional distress and exemplary damages. Although the reference to legal damages in my judgment clearly contemplates such damages, the Congress should explicitly say so.

Fifth, provide explicitly for jury trial. The constitution requires it.

Sixth, the private cause of action contains no explicit statute of limitations. Please do so. PELA would propose three years. That is the statute that has been commonly used in actions like this and is the statute of limitations contained in the FLSA.

Seventh, expand the coverage of the act to include the paper and pencil honesty tests that if this bill as written is passed, will become the rage of the future. There is, as far as I know, no studies done that show that these paper and pencil honesty tests have any greater validity or reliability than the polygraph or the voice stress analyzer.

Finally and possibly most importantly, there is clearly a need for federal legislation. Nonetheless, state statutory and common law causes of action, not inconsistent with H.R. 1212, should not be preempted. Allowing the state statutory and common law remedies to remain in effect is an effective answer to those who oppose this legislation on the basis of federalism and states' rights.

Thank you, Mr. Chairman.

Mr. MARTINEZ. Thank you, Mr. Fitzpatrick.

I have a couple of questions only. One is to Mr. Markman. You address states' rights. What about the rights of citizens? The Constitution says that you do not have to give incriminating testimony to incriminate yourself. You can refuse. You have that Fifth Amendment right. We have always presumed that you are innocent until proven guilty. That is the traditional standard and the basis of our system of justice.

There is a potential for a violation of a person's privacy, and for the violation of his civil rights through polygraph tests. So, I think that the federal government does have a responsibility to control the abuse.

What would you say to the federal government saying, all right, we are going to establish, first of all, that there is only limited use of the polygraph for specific reasons and only as a part of a total investigation, and say, now you regulate it, but that is what you have to comply with? What would the Justice Department say to that?

Mr. MARKMAN. Mr. Chairman, first of all, I would prefer to couch our position in terms of federalism rather than states' rights. As you may have noticed in our testimony, we attempt fairly rigorously to distinguish between the concepts and suggest that there are, of course, many areas of governmental policy that are appropriately regulated by the federal government. We simply do not believe that polygraph regulation happens to be one of those areas.

Of course, if there are violations of the federal Constitution, it is entirely appropriate for the Congress, as well as for state legislatures, to be redressing those problems.

The specific illustrations you note though, of course, do not raise constitutional problems. The Constitution applies to the relationships between individuals and the state, and does not speak to private relationships; the specific provisions you were citing further are limited to the criminal justice context. So, there really would not be any constitutional problems that we are talking about here.

Mr. Chairman, one of the concerns that we have is that there is no ideal system for preemployment screening. The alternative to polygraphs is not some perfect system where everyone is able to determine with 100 percent accuracy whether or not individuals are being honest with employers, whether or not individuals are being honest in the context of disciplinary investigations. Rather, we are talking about personnel interviews; we are talking about background checks; we are talking about paper and pencil tests; we are talking about a wide variety of alternatives, none of which is 100 percent accurate. So, we have to take a look at polygraph tests in that larger perspective.

But I guess to summarize our concern again, we think that these are difficult questions. Honest people can disagree honestly on them, and as a result it is entirely appropriate for the states to be debating these issues vigorously. I respect the expertise that a number of my colleagues on this panel have brought to the discussion, but I think it would be much more appropriate for them to be bringing their expertise to state legislative bodies rather than to the Congress.

Mr. MARTINEZ. Well, let me change the question a little bit, and ask you in regards to the states' rights. You are aware that the Civil Rights Act, the Fair Labor Standard Act, the National Labor Relations Act do regulate labor practices nationally. Why would it be any different in this particular situation with polygraphs?

Mr. MARKMAN. Well, I think each individual legislative initiative has got to be assessed in terms of the kinds of factors that we lay out here. And there is no fine bright line that distinguishes between those things that are appropriately carried out by the federal government and those that are appropriately carried out by the states. We simply suggest that those factors have to be weighed. And it is the judgment of this Administration that, after going through that weighing process, the particular issue in controversy here is more appropriately regulated by the states.

Mr. MARTINEZ. So, what you are saying is state regulation is the judgment of this Administration.

Mr. MARKMAN. Yes, sir. We are not saying—I think it ought to be emphasized—that this bill is unconstitutional. We are simply

saying that as a matter of policy, it would be more appropriate that these matters be regulated by the states.

Mr. MARTINEZ. Mr. Katkin, is it true that there, exist nowhere any scientific studies that have been done on the validity of the polygraphs themselves in the work place?

Mr. KATKIN. That is correct. Specifically for employment screening, there are no tests, nor do I think could there be any. One of the real problems is that in order to do an experiment to test the validity of the polygraph, you have to know what ground truth is, what the real truth is.

Now, in a criminal investigation you have alternate sources of evidence to let you know if someone is guilty or not guilty. And you can check those sources of evidence against your polygraph. In an employment screening situation, what is the evidence that you—how do you ever validate that the polygraph judgment is correct? Against what standard?

If your test is screening someone to be a competent employee or an honest employee, if the polygraph says, no, don't hire this person, you screen them out, and he is gone, you have no way of ever following up to find out if that judgment was correct or not.

We do know, of course, that there are many employees who pass the test and get jobs who turn out to be dishonest. So, obviously, we know that sometimes they miss on that side. But there is no obvious scientific way that one can ever develop the kind of empirical evidence one needs to know if the polygraph worked or did not work.

Mr. MARTINEZ. Thank you.

We have five minutes before breaking for the vote that is taking place now. So, I will turn to Mr. Gunderson.

Mr. GUNDERSON. Mr. Markman, is Justice the lead agency in the Administration on this bill?

Mr. MARKMAN. Justice has been designated to testify on this bill.

Mr. GUNDERSON. Will it be the recommendation of the Justice Department to the President to veto this bill, should it pass?

Mr. MARKMAN. Yes, sir; it would be.

Mr. GUNDERSON. Would you comment, to a degree, on the same type of question asked by Mr. Martinez? That focuses on the whole rights of the federal government versus the local governments.

The Justice Department has come out for some pretty strong efforts in terms of product liability and limits on that in respect to the fact that interstate commerce today cannot really be regulated effectively by each of the different states. I think of a number of the companies across the country who use polygraph are active in many different states. Are you suggesting that we ought to have 50 different policies in regard to the use of polygraph all within the same company?

Mr. MARKMAN. I think you raise a very good question, Congressman Gunderson. There was, as I think you know, a considerable debate that took place within the Administration as far as the feasibility of supporting some kind of uniform product liability standards. And the Administration, indeed, concluded that that was an appropriate area for federal regulation although not without some dissent and not without some debate.

The distinction there, it seems to me, is that in talking about some kind of uniform product liability standard, we have to take into consideration the fact that a great many businesses do conduct their business in more than one state. And to require them to have to abide by 50 different standards in that context might well impose such a difficult constraint upon their ability to manufacture products that products may never even enter the marketplace. It is simply a balance: in regulating product liability, we are talking about the essence of the manufacturing process. And if an individual is going to be deterred from producing a certain good because of product liability laws, it would be very difficult for those products ever to be produced in the first place.

Mr. GUNDERSON. Does the Department of Justice believe that polygraph testing is valid and accurate?

Mr. MARKMAN. We have no position on that here.

Mr. GUNDERSON. Is there any—are there any certain provisions which, if included in this legislation, would make it more acceptable to the Administration, or are you taking the position based purely on the federalism grounds that no matter what is included in the legislation, it will be unacceptable to the President?

Mr. MARKMAN. Yes, sir. Our position is taken purely on the basis of federalism. We profess to have no particular expertise on polygraphs for purposes of this debate. We have listened to the debate. We have read the discussions on the veracity and the credibility of lie detectors, and there is a great range of opinion that exists. We have looked at the debate that has taken place in the states, and we have seen that the states have responded in widely disparate ways to this controversy. So, yes; I would say our position is based and founded exclusively upon federalism concerns.

Mr. GUNDERSON. Do you reject even Congressman Darden's proposal of minimum standards at the federal level allowing states the discretion to go above and beyond that if they so choose?

Mr. MARKMAN. Yes, sir. I do not think our federalism concerns would be mitigated at all by that proposal.

Mr. GUNDERSON. Thank you.

Thank you, Mr. Chairman.

Mr. MARTINEZ. Thank you, Mr. Gunderson.

At this time it is probably appropriate to take a break, and we will be gone ten minutes.

We would ask the panel members to remain with us. I am sure other members of Congress have questions.

[Recess.]

Mr. MARTINEZ. We will proceed.

Mr. Williams?

Mr. WILLIAMS. Thank you, Mr. Chairman.

We apologize for our delay but voting kept us away longer than we intended.

Mr. Markman, I understand and have regard for the Administration's position with regard to federalism or states' rights, depending on the definition. If it could be demonstrated that businesses or citizens were violating the wishes of that state by forcing their workers or prospective employees into another state which did not prohibit lie detectors, would the Administration's position remain the same?

Mr. MARKMAN. Well, again, let me emphasize, Congressman that in talking about the position on specific bills, in part I was talking about the Justice Department's recommendations, and in part I was trying to represent the Administration.

Yes, it might well be that the Administration's position would be different to the extent that you were talking about, for example, busing employee applicants from one state into another state which permitted lie detector use on a more liberal basis than did the state in which the employer was located, or else the kind of ploy that you are discussing. Yes, that would have much more of a direct and immediate interstate impact, and it might well provide the basis for a different position within the Administration.

Mr. WILLIAMS. Mr. Katkin, the American Polygraph Association has recommended that polygraph tests should not be given to people who are emotionally or physically unfit to take the test. Are polygraph examiners the appropriate people to determine emotional and physical fitness?

Mr. KATKIN. I doubt it. I do not know of any polygraph training school that trains people in the diagnosis of emotional fitness.

Mr. WILLIAMS. You understand the discipline. How would we determine a person's threshold, emotional or physical fitness?

Mr. KATKIN. I do not think I should address physical fitness. I will let Dr. Beary address that. But on emotional fitness, let me just point out that the inter-rate or reliability judgments on emotional state among professionally trained psychiatrists and psychologists is far less impressive than we would like it to be professionally. And that is among people who have had extensive postdoctoral training and Ph.D. level training. It is a very, very difficult judgment call to diagnose emotional states. And it takes years of specialized training.

It is very questionable in my mind whether the typical practitioner of the field polygraph has even a glimmering of training in that area, and probably is simply not qualified to make those judgments. It is a noble sentiment. I do not think it has any practical applications or possibilities.

Mr. WILLIAMS. Dr. Beary, are you a medical doctor?

Dr. BEARY. Yes, I am, sir.

Mr. WILLIAMS. How would you define physical fitness for the purpose of taking the polygraph test? Could we identify that person?

Dr. BEARY. I would say probably physical fitness might have a more minor role here. I think the line of questioning seems to be leading to the fact that interpreting these things is a subjective process. It is a matter of opinion. It is not a matter of science. It is not a matter of a test that gives you a reproducible result. So, if you have 100 different people read them, you know, you are probably going to get a large scatter in terms of the interpretations.

Mr. WILLIAMS. If I may, let me ask it this way. Drugs and alcohol impair one's physical being in the short term for this purpose of testing. Is that correct?

Dr. BEARY. Yes. I think perhaps I see what you are getting at there, that if someone were taking a beta blocker to calm the heart or a tranquilizer or some such thing, you would actually have to combine this with a urinalysis test to do drug screening as well. So, you really to run it right would need two things linked together to

have that kind of assurance on the physical side of it. Otherwise, obviously a talented deceptor would know enough to go get some propranolol and calm himself before taking the exam or a tranquilizer of some sort that certainly the examiner is not going to be able to appreciate. As a physician you cannot always rely on people taking what they say they are taking, and then you get surprising results when you are doing different tests. I have great skepticism whether examiners, who assert they can tell if someone is drug impaired or not, can do that. I doubt it very much.

Mr. WILLIAMS. Let me share with the committee an article which appeared today in the New York Times. Perhaps you saw it. It was about an October 24, 1982, story that was filed by the Times. This was the headline, "U.S. Aides Say British Spy Gave Soviets Key Data." And the reporter with the Times, Philip Taubman, indicated that he had an American source or sources.

President Reagan's National Security Advisor at that time was William Clark. He asked the FBI to investigate immediately the American sources. Members of the National Security Council staff were—staff were told to volunteer for a lie detector test because, among other people, William Casey thought that lie detector tests were very important.

One of the staff at that time was a Marine lieutenant colonel, Bud McFarlane. And, he took the test, and he failed the test. And he was shocked and said there must be some mistake. And asked to take it again, took it again and failed it again. So, he called the publisher of the New York Times, Arthur Sulzberger, and said, I need to know if I am the source. I know I am not, but do you think I am the source? So, Sulzberger said, well, let me talk to A.M. Rosenthal, who is the executive editor, and get back to you.

And of course, the problem for him was this. They do not give out sources. So, should they tell people who are not sources that they are not. And if they do that, doesn't the next person come in and then say, well, am I the source.

But in this instance, because of the fragileness of this situation and perhaps of Bud McFarlane himself, they called him back and said to him, "You were not the source." And Bud McFarlane said, well, I am glad to hear that, but you need to tell it to this fellow. And he handed the President the phone. And Mr. Sulzberger then recited that he had a good Marine in Bud McFarlane. And Bud McFarlane, indeed, was not the source, despite the fact that he had failed the polygraph twice. The article, by the way, notes that President Reagan cheerfully advised the New York Times that, well, I am surrounded by a lot of Marines in this Administration, as I guess we have learned since. [Laughter.]

McFarlane later went to the fellow that gave him the second test because it was very carefully administered. After all, we had a public figure's future professional life on the line, and so it was very carefully administered by a very well trained examiner. The examiner indicated to Mr. McFarlane that, it is difficult to get reliable results from some people. Now, that is more than anecdotal evidence. It is now public evidence.

And I think if Americans expect that anybody in this latest effort down at the White House is telling the truth, it is Bud

McFarlane above all who is telling the truth although he failed the test twice.

That is all I have, Mr. Chairman.

[The New York Times article follows:]

THE NEW YORK TIMES, THURSDAY, MARCH 5, 1987

ESSAY | William Safire

The Polygraph Lied

WASHINGTON

While poking into the motivations of former national security adviser Robert (Bud) McFarlane, I tripped over a story that took place in 1982 in which The New York Times played a part. Because I was not privy to The Times's role, and because recent leads came from people outside the newspaper who share my outrage at "lie detectors," I feel free to tell it now.

On Oct. 24, 1982, the reporter Philip Taubman of The New York Times filed an exclusive story. Headline: "U.S. Aides Say British Spy Gave Soviet Key Data." Citing "American sources," Mr. Taubman wrote that the British Government had refused to report on a serious security leak by a Soviet agent, Geoffrey Arthur Prime, at the main electronic intelligence center in Cheltenham.

The Russians knew exactly what secrets Mr. Prime had been providing; the Brits knew and were concealing their embarrassment; our National Security Agency knew, too, thanks to some listening-in on the Brits. Only the public was in the dark; naturally, Mr. Reagan's national security adviser at the time, William Clark, asked the F.B.I. to investigate to find out what "American sources" enabled the public to find out the degree to which its security was imperiled.

Members of Mr. Clark's National Security Council staff were told to volunteer for polygraph tests because Administration stalwarts Caspar Weinberger, Frank Carlucci and William Casey were fervent believers in the accuracy of "lie detectors," which they consider the divining rods of truth.

One of those who were tested was Lieutenant Colonel McFarlane, who was then serving as Judge Clark's N.S.C. deputy. He failed the polygraph test.

The stunned colonel said there had to be some mistake. He was certain he was not the source of The Times's story; he asked for another test. The experienced polygraph examiner, who was aware that a loyal military officer could be ruined by the results, conducted the second test with extraordinary care.

Bud McFarlane flunked again; the examination branded him a liar and jeopardized his career.

In desperation, Colonel McFarlane called the publisher of The New York Times, Arthur O. Sulzberger, who happened also to be a former marine. Bud said nothing of the polygraph tests, but said he was sure he was not the source of Mr. Taubman's story. Could The Times corroborate that he was not the leaker?

Punch Sulzberger said he would discuss it with A.M. Rosenthal, then Executive Editor. The problem the journalists faced was this: Once the precedent was set for "clearing" any Government official as having not been a source, where would it end? How many guesses did the Government get? In this case, the publisher decided to back up Bud McFarlane's truthful assertion but not to respond to further questions about other suspects.

Accordingly, when the deputy to the national security adviser called back, the publisher told him, "You were not the source."

Colonel McFarlane said, "Don't tell me, tell it to this man." He then put on the President of the United States. The surprised Mr. Sulzberger then told Mr. Reagan that he was wrong to suspect this good marine; the President remarked cheerfully how he was surrounded by marines in his Administration (Baker, Shultz, Regan) and that was that.

Bud McFarlane, certified non-leaker, remained on the White House staff and was promoted a year later to na-

A 1982 appeal by McFarlane.

tional security adviser. The polygraph testers later coolly explained to the man whose career they almost terminated that it really was difficult to get reliable results about questions of leaking from officials who occasionally had to talk to the press.

Consider what this episode reveals. Bud McFarlane was in fact not the leaker; he was falsely condemned by a Kafkaesque machine whose printout would be decisive with the President of the U.S.; his innocence had to be affirmed by a newspaper that had to decide to break its own rules guarding its ability to get the news. This also shows how an adept spy in the N.S.C. could outwit the polygraph and become the American Prime.

A few months ago, a woman was dismissed at John Poindexter's N.S.C. for refusing to take a polygraph test. A few months from now, Congressional committees will call Bud McFarlane, who seeks no immunity, and compare his version of who knew what and when with polygraph proponents like John Poindexter, Ed Meese, Donald Regan, Frank Carlucci and Caspar Weinberger.

My inclination will be to believe the man who twice flunked the lying polygraph.

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Mr. MARTINEZ. Thank you very much, Mr. Williams.

Before I go to Mr. Owens, in the discussion you were having, Dr. Beary, with Mr. Williams regarding a person being able to take some kind of a drug that would cause him to very easily pass the test, wouldn't it be the person that obviously was guilty, but did not want to be detected more likely to take the drug than the innocent person that is nervous and sweaty because he is under the gun of an accusation?

Dr. BEARY. That is correct. That would be the person who would have the motive to do such a thing.

Now, I would just draw us back to the central point again. If no one after years of looking has been able to show you a Pinocchio response, there really is not anything to debate about. If I had a thermometer that was accurate plus or minus 5 degrees when I was trying to size up how sick a patient was, I would be very hesitant to make any decisions on such an instrument.

Mr. MARTINEZ. Thank you, Doctor.

Mr. KATKIN. Mr. Chairman, may I respond also to the question?

Mr. MARTINEZ. Yes.

Mr. KATKIN. There is some research that has been published by Professor Raskin at the University of Utah, who is an acknowledged expert in the area, demonstrating that people—that he has had great success in training ordinary people on how to beat the test, and that the critical ingredient is a certain techniques that can be trained and motivation to do so. In response to your question, I suspect a critical ingredient then in the likelihood of someone beating the test is motivation to beat the test and the desire to learn the techniques. There are techniques that can be learned.

If I could add just one point with your permission. In this morning's discussion with Congressman Darden, there was some discussion of improvements in technology in recent years. And that happens to be the area of my own specific research expertise, is on the underlying psychophysiological technology that goes into polygraph work.

And what I would like to point out that while there has been an obvious electronics revolution in the last decade which has led to fantastic developments in computers and miniaturization and everything you can think of, there has been no essential change in the basic design and use of the polygraph in 30 years. What there has been in an improvement in the sense of miniaturization and improvement in transitorization and so on. But the fundamental instrument that is in use today has been developed, conceptually developed, 30 years ago. It has not changed, and there is not any appreciable technological improvement in the actual work. There is only a miniaturization and a slightly higher rate of longevity of the machines, but no change in the basic technology at all.

Mr. MARTINEZ. It is the same machine in a different box.

Mr. KATKIN. Sure, absolutely.

Mr. MARTINEZ. Thank you.

Mr. Owens?

Mr. OWENS. Dr. Beary, Mr. Katkin, among your colleagues are there any significant numbers of dissenters to your viewpoints on this? Is there somebody offering a set of scientific arguments in the other direction—a significant body of people, reputable people?

Dr. BEARY. I certainly have not encountered any. And the AMA looked high and low for someone who had data that there is no reason to think if it is good data, it should be the same if you try to reproduce it New York as if you try to reproduce it in California because scientific information does not change depending on who does the study. So, I have not encountered physician, one Ph.D., anywhere in the United States who has been able to say what the Pinocchio response is. And I am not surprised because there is not one.

The other element of this that the AMA Council touched on had to do with the subjective nature of all of this. And some of you may have seen that 60 Minutes piece in May of 1986 where basically it made the point that you get the result from the polygraph that you want to get from it. You hire the person, and you know, you are going to get what you want in some circumstances. These three employees were paid to tell the truth. The truth was known, so there was no question about that. But when the polygraph examiner was hired, the person coming into the office said the camera that was in this cabinet is not there anymore. I just wonder if Bill might have done that. Well, Company A found that Bill did it, and Company B randomly selected from the phone books—there was no bias. These were just people out there to serve the public. Company B comes in and they say, well, I think Barbara—you know, I am a little worried about whether she might have been around at this time. And Barbara, of course, is being paid the truth, was telling the truth. But the polygraph said she stole the camera.

And so, a week later Company C, polygraph Company C, again randomly selected from the New York phone book, comes down. This is all videotaped through a hidden thing in the wall and whatnot. It makes an interesting tape if you have not seen it. They said, well, we think we are a little concerned. We do not know where this camera is, but we think we are a little worried about Frank. And goodness, this time Frank is determined to be the thief.

So, I think that was a pretty good demonstration of the subjectivity of this thing. And it is much more in the——

Mr. OWENS. You used the word subjectivity. I would use the word it is a racket. It is not subjectivity, it is a racket that is dishonest.

Why, if this kind of evidence exists, are we not talking about consumer fraud and medical quackery, and can we get the whole thing banned for public, as well as private use? Why are we so gingerly with a such a contraption as this?

Yes?

Mr. KATKIN. Well, I could perhaps explain that. I think perhaps, although it is a fine line, the polygraphers may not be fraudulent because I think they believe what they are saying. I do not think that they are consciously wanting——

Mr. OWENS. You think they do?

Mr. KATKIN. Yes, I think that they do——

Mr. OWENS. Except in the experiment that he indicated.

Mr. KATKIN. I think so. I think the polygrapher who goes into the situation and looks at his polygraph charts, and comes to his conclusions, has convinced himself that he knows what he is doing. The tragic fact is that the scientific evidence shows otherwise. But I have no reason to believe that the typical working polygrapher is

consciously committing fraud. I think he is committing some self-deception ironically.

But to answer your question about dissention, among professional psychologists there is virtually no disagreement about the scientific evidence. There may be some dissention about the political aspects or the moral aspects and whether or not federalism should be upheld or not. But there is no dissention that I know of among professional psychologists on the meaning of the scientific data which shows that the polygraph test is severely flawed in employment screening situations.

Mr. OWENS. You had a comment, Mr. Markman?

Mr. MARKMAN. Yes, sir. Thank you, Congressman Owens.

I would just like to ask one question here which is why in light of all this evidence presented here, millions and millions of employers have seen fit to spend an average of $50 to $60 per polygraph examination; to risk the antagonism of their employees and prospective employees; and to risk losing their best employees to competitors. Again, I have no brief for polygraph examinations, and every one of the individuals on this panel has far greater expertise on that subject than I do, but I would nevertheless like to leave that question with the committee and ask why all these businessmen do think it is worth their time and effort and the risk that they are undertaking with their own employees to administer these tests.

Mr. OWENS. I do not want to prolong the argument, but I am sure there is an easy one for that one. The argument is that they do not want to lose employees to competitors. They use it to get rid of employees that they do not want. They use it to intimidate people that they want to intimidate. There are a number reasons why they would use an instrument even if they did not—they knew it was not scientifically sound.

I have no further questions, Mr. Chairman.

Mr. MARTINEZ. Mr. Owens, thank you.

I think Dr. Beary wanted to answer that. Would you do it very briefly? We are running into a time problem with one of our other witnesses.

Dr. BEARY. Sure. That is a very reasonable question to ask. When you see something so widely used, you have to say, well, what are the motives for using it. And basically they are twofold. One of them could be legitimate as a stress detector in an investigation, a limited situation, limited people. The only person who knew the crime was committed in a room with a red door on it reacts out of proportion on the test. And then traditional detective work does the rest. You make no decision on it. You just say, I am perhaps suspicious of this person. But it is a very focused thing. And you are not even claiming it is a lie detector. You are calling it a stress detector and using it as such.

The second application, and I think that one that probably accounts for why it is widely used is that what it is, is really an electronic scarecrow. Now we all know that it cannot reliably detect lies, but the average person taking one does not know that. And it makes no difference whether the thing is plugged in or is not plugged in in that context because when they are hooked up to it, they are going to confess some useful things. And anyone who has

worked with these things has a few anecdotes of how he found out such and such because they confessed on the polygraph.

Well, of course, we found in that Wall Street Journal article last week that if you just ask the people, they will confess. You would not think so, but if you ask, have you ever stolen from your employer while you are trying to get a job, many people quite happily just write down that, yes, indeed, they did.

So, I think that is the phenomenon that is going on. It is an electronic scarecrow. It is not a scientific instrument or anything like that, but that would account for its continued popularity, and most managers and companies do not have the scientific expertise to size this up. They make the decision based on other criteria, not science.

Mr. WILLIAMS. If the Chairman would yield, I recognize time is fleeting, but it seems to me that is correct. And along with that, tests are cheap. They are not free, but they are cheap. They are sure cheaper for a business man who has got a theft problem or worries about a theft problem. Theft is a major problem for American business. There is not any question about that.

They are convinced this thing works, and it is cheaper than having a good screening personnel system. It might be cheaper than buying another safe, than labeling all of the items, than having one of those detectors at the door for employees going out. It is cheap. And unfortunately, too many businessmen in America, because they do not realize that it is not more effective than it is, are unwittingly willing to throw the net out and round up 20 to just get the one.

My point is we have to stop businessmen from doing that in our society because we are turning the Constitution on its head when we allow them to do that. We know it, and we ought to stop them.

Mr. MARTINEZ. Thank you, Mr. Williams. And I thank the panel, too, for its important testimony.

Let me announce at this time that the record will remain open for two weeks to take additional testimony from anyone wishing to give it. Members might communicate to you with additional questions for you to answer, for the record? We would appreciate your timely response. Thank you again.

At this time I would like to call up the next panel, Nester Macho, Consultant for Orkin Pest Control; John Bauer, Esquire, Staff Attorney, Legal Action Center, New York, New York; Joseph O'Neill, Director of Police, Conrail, on behalf of the Association of American Railroads; and Michael Darby, Victim, of Lawrenceville, Georgia.

And let me first take the opportunity to announce that Mr. Bartlett, who is a member of the full committee, wished me to extend a courteous invitation and welcome to Mr. Darby and recognize that you are from his district.

Mr. DARBY. Thank you very much, Mr. Chairman.

Mr. MARTINEZ. Because of a time problem we are going to allow Michael Darby to give his testimony, and then ask him questions before we proceed with the rest of the panel because he does have to catch a plane.

Mr. Darby?

STATEMENT OF MICHAEL DARBY, VICTIM, LAWRENCEVILLE, GA

Mr. DARBY. Thank you, Mr. Chairman.

It is a privilege to be given an opportunity to appear before you in this committee and tell you my experiences. And I truly do thank you.

As stated, my name is Michael Darby, and I live at 631 Cricket Hill Trail in Lawrenceville, Georgia.

For the last 15 years I have been employed in the jewelry industry. At the time of the incident I am going to describe, I was a manager of a Bailey, Banks and Biddle jewelry store, which is a division of Zales Corporation. The store is located at Gwinnett Place Mall in Duluth, Georgia.

Zales has an internal security department for difficulties with theft. They do periodic polygraph examinations and preemployment polygraph examinations. I have never suffered a loss in my store, and feel that these problems could be handled by good management procedures.

In June of 1986, Zales had a problem with theft in one of their stores in Atlanta, and the security department examined the employees at that store and found several people that I was told did not pass the polygraph examination. And they were subsequently fired. It was then decided that they would polygraph employees on all the remaining stores, whether or not they had losses.

When the examiners came to my store, they first put paper over the windows and then began examining employees from other stores who had failed the test. We all knew that that was why the other employees were there, and I felt it was very personally embarrassing for them.

When my turn came, I was asked to sign a waiver saying that I was taking test voluntarily. Of course, I understood that if I did not take the test, I would be fired.

The woman who administered the test to me asked questions like: "Do you have knowledge of any person or persons in the Atlanta area who are involved in drugs? Are there any questions you would rather that I not ask you?" That is a pretty general statement. Sometimes she would say, "Let me talk to my associate." And then she would leave the room with me strapped to the machine alone for what felt like 20 to 30 minutes. She would then come back and say, "It doesn't look good. Let's do it again." This went on for two and a half hours.

Finally her associate, a man, came into the room and said, "Fess up or you're fired." He said that all I had to do was tell them what I knew about the others who worked in the company, and even if it was hearsay or gossip, I should write down and clear my conscience, all this stuff, or he could not clear me and I would be fired. They told me that this information would be shared only with the regional vice president of our market, but I found out later that it was disclosed to others.

I was forced to write down gossip and idle talk about what people did off the job, particularly drug use. After I wrote the statement, I was given another polygraph exam and I passed that one.

Then the security people polygraphed the other people in my store. Two employees with long-standing good records were fired,

one supposedly for conflict of interest and the other because he supposedly had knowledge of taking something. It was never said what.

I was very upset by this and felt very bad about it. It was uncalled for. I had taken polygraph examinations before, but never another where I was treated with such discourtesy. It left me with a very bad taste in my mouth. In the months that followed, I felt unable to do my job because of this experience.

I was worried about my future and afraid that it would never happen again and afraid that it would happen again. I felt a lot of guilt about having to pass on gossip about other workers that might have gotten them into trouble.

I called the American Civil Liberties Union and suggested that I—they suggested that I complain to the Georgia Polygraph Board. Never heard of this board before. However, I was afraid I would lose my job if I did complain because I had to sign a waiver that I was not going to complain and that I was taking the test voluntarily.

Because of this experience, I left the job with Zales Corporation in January of 1987. I know that they are continuing the practice because I know others who were fired after they were told they failed the test.

I will never take another polygraph examination. I feel that I am honest, and that people should look at my actions. I think it is wrong to ask a person to bare their sole to a machine; that it is wrong to put so much weight on it. You might as well toss a coin to get the right answer.

Due to the use of polygraphs, I feel I cannot continue to work in the industry that I am trained for, because taking the exam is too stressful. Finding work remains difficult, and I am currently self-employed as a consulting interior design specialist for a retail business.

I hope that this committee will pass legislation and stop this terrible practice which is subjecting employees to this kind of abuse. I will be glad to provide any additional information that the committee might wish.

Thank you.

[The prepared statement of Michael Darby follows:]

STATEMENT OF MICHAEL DARBY

My name is Michael Darby, I live at 631 Cricket Hill Trail, Lawrenceville, Georgia.

For the last 15 years I have been employed in the jewelry industry. At the time of this incident I was the manager of a Bailey, Banks and Biddle jewelry store, a division of the Zales corporation, at Gwinnett Place Mall, Duluth, Georgia. Zales has an internal security department for difficulties with theft. They do periodic polygraph examinations and preemployment polygraph examinations. I never suffered a loss in my store and feel that these problems can be handled by good management procedures.

In June of 1986 Zales had a problem with theft in one of their in stores in Atlanta, and the security department examined the employees at that store and found several people that I was told didn't pass a polygraph examination and fired them. It was then decided that they would polygraph employees in all the remaining stores, whether or not these stores had losses.

When the examiners came to my store they first put paper over the windows and began examining employees from other stores who had failed the test. We all knew that that was why these other employees were there and it was very embarrassing for them.

When my turn came I was asked to sign a waiver saying that I was taking the test voluntarily. Of course, I understood that if I didn't take the test I would be fired.

The woman who gave me the test asked me questions like, "Do you have any knowledge of any person or persons in the Atlanta area who are involved in drugs? Are there any questions you would rather I not ask you?". Sometimes she would say "Let me talk to my associate" and then leave the room with me strapped to the machine alone for what felt like 20-30 minutes. She would then come back and say "It doesn't look good, let's do it again". This went on for two and a half hours.

Finally, her associate, a man, came into the room and said " 'fess up or you're fired." He said that I had to tell them all I knew about others who worked there, even if it was hearsay or gossip, that I should clear my conscience and write all this stuff down or he couldn't clear me and I'd be fired. They told me that they would only give this information to the regional Vice President, but I found out later that they had told it to others.

I was forced to write down gossip and idle talk about what people did off the job, particularly drug use. After I wrote the statement I was given another polygraph exam and told that I passed.

Then the security people polygraphed the other people in my store. Two employees with long-standing good records were fired, one supposedly for conflict of interest, and the other because he supposedly had knowledge of taking something.

I was very upset by this and felt very bad about it. It was uncalled for. I had taken polygraph examinations before, but never another where I was treated with such discourtesy. It left me with a bad taste in my mouth. In the months that followed, I felt unable to do my job because of this experience. I was worried about my future and afraid that it would happen again. I felt a lot of guilt about having to pass on gossip about other workers that might have gotten them into trouble.

I called the American Civil Liberties Union and they suggested that I complain to the Georgia Polygraph Board. I had never heard of the Board before this. I was afraid that I'd lose my job if I complained, because I had to sign a waiver that I wasn't going to complain and that I was taking the test voluntarily.

Because of this experience I left the job with the Zales corporation in January of 1987. I know that they are continuing this practice because I know others who were fired after they were told they failed the test.

I'll never take another polygraph examination. I feel that I am honest and that people should look at my actions. I think it is wrong to ask a person to bare their soul to a machine. It is wrong to put so much weight on it. You might as well toss a coin.

Due to the use of polygraphs I feel that I can't continue to work in in the industry that I am trained for because taking the exam is too stressful. Finding work remains difficult. I am now self employed as a consulting interior design specialist for retail businesses.

I hope that the committee will pass this legislation and stop this terrible practice which is subjecting employees to this kind of abuse. I will be glad to provide any additional information that the committee wishes.

Mr. MARTINEZ. Thank you, Mr. Darby. I have one question right off the bat.

Mr. DARBY. Yes.

Mr. MARTINEZ. You are from the state of Georgia that professes to have a model program for regulating polygraphers——

Mr. DARBY. That is correct.

Mr. MARTINEZ [continuing]. Mr. Darden earlier testified that in his bill he hopes to set Georgia's as the national regulations and standards for polygraphers. How far is Lawrenceville from Mr. Darden's district?

Mr. DARBY. He is in the northeast, I beg your pardon, the northwest Atlanta area. I am in the northeast. We are some 20 miles apart.

Mr. MARTINEZ. Twenty miles apart.

Mr. DARBY. Yes.

Mr. MARTINEZ. I think that Mr. Darden should start investigating in his own state and look around.

This alarmed me because at one particular point in time I thought that maybe regulating the industry and making sure that qualified people were polygraphers was the best solution. Now, almost anybody that wants to go to a school and learn how to operate the machine can become a polygrapher. There are no psychological profiles given to them. They do not have a history of any education in psychiatry or anything related. Many have no knowledge of or education in any areas of human behavior. As a result, many are very unqualified to be in that particular position, but they are able to.

I thought that, if there were some standards, some regulations, this might be the way to go to make what now seems to be little more than a black box more effective and more efficient. I do not think it can be done, especially if in a state that professes to have a model program, because what you described can happen in spite of a model program.

You did find out about the board. You did allude to the fact you were told to file a complaint with that board. Did you file a complaint with that board and what was the subsequent action?

Mr. DARBY. I contacted the Georgia Board of Polygraph Examiners and I was told that I could complain in writing and that subsequently they would conduct an investigation. The problem I see with that is being employed by someone who had just conducted the polygraph examination and then complaining about them is subjecting them to a fine was one sure way for me to lose my job.

Mr. MARTINEZ. So as a consequence you did nothing.

Mr. DARBY. No, sir, I did nothing.

Mr. MARTINEZ. You are not now employed with him. Have you since filed a complaint?

Mr. DARBY. No, sir, I have not.

Mr. MARTINEZ. Do you intend to?

Mr. DARBY. Yes, sir, I do.

Mr. MARTINEZ. Thank you.

Mr. Williams.

Mr. WILLIAMS. Were you made aware of your rights under the Georgia law before you took the test?

Mr. DARBY. The waiver that I signed was very general. It did say that I was conducting it on my own free will and that I did have the right to respond, or to receive a copy of the examination in writing which I must ask for it in writing.

Mr. WILLIAMS. Does that include a waiver of your right to sue?

Mr. DARBY. Yes, sir, it does.

Mr. WILLIAMS. It does?

Mr. DARBY. Yes.

Mr. WILLIAMS. Did they tell you at any time under the Georgia law you could stop the examination and walk away?

Mr. DARBY. Yes, sir, that was included in the——

Mr. WILLIAMS. Why did you not do that?

Mr. DARBY. For the very reason that I was taking the exam and if I should leave the examining room because I felt I could not answer a question, I will lose my job. It's that kind of drive.

Mr. WILLIAMS. Interesting——

Mr. MARTINEZ. Excuse me. Would you yield, please?

Mr. WILLIAMS. Yes, of course.

Mr. MARTINEZ. Did you not indicate at one time they came in and told you that you were fired unless you filed a statement of other activities of other employees?

Mr. DARBY. Yes, sir, that is correct.

Mr. WILLIAMS. I guess it is one thing for our society to place rights before people and something else to make sure they have access to them. In this case, Georgia has a lot of rights out there, but you have no access to them without punitive repercussions.

Thank you, Mr. Chairman.

Mr. MARTINEZ. Thank you, Mr. Williams.

Mr. Owens.

Mr. OWENS. Yes. Mr. Darby, during the course of the administration of the polygraph examination, was there one person who acted as a technician and the other was an interrogator or investigator? Was the technician interrogating you also?

Mr. DARBY. The technician shared duty interrogating with this person outside of the room who would evaluate the polygraph along with her while she was out of the room. But principally she served as the person who administered the test with the interrogator.

Mr. OWENS. She was the one who came into the room and made the statement that it does not look good but——

Mr. DARBY. Yes, that is right.

Mr. OWENS [continuing]. If you do this, we might be able to work something out?

Mr. DARBY. Yes, sir, she was making the statement that it does not look good. Let us try it again. However, the gentleman she had been conferring with was the one who came in and said I had better just bare my soul. So that was his only contact with me.

Mr. OWENS. No further questions.

Mr. MARTINEZ. Mr. Jontz.

Mr. JONTZ. I have no questions, Mr. Chairman.

Mr. MARTINEZ. Thank you.

Thank you, Mr. Darby. I know you have to catch a plane, so if you would like to leave now, you are free to do so.

Mr. DARBY. Thank you very much, gentlemen.

Mr. MARTINEZ. Thank you.

Then we will go to Mr. Macho, who is a consultant for Orkin Pest Control. Would you begin?

STATEMENT OF NESTER MACHO, CONSULTANT FOR ORKIN PEST CONTROL

Mr. MACHO. Thank you, Mr. Chairman.

I appreciate the opportunity to testify before this subcommittee today on behalf of Orkin Pest Control. To show my appreciation, I will, with your permission, submit my written statement for the record and briefly summarize that testimony.

Mr. MARTINEZ. Thank you.

Mr. MACHO. My name is Nester Macho, and I am a security consultant for Orkin Pest Control, the world's largest pest control company. Testifying in that capacity, I respectfully oppose the Employee Polygraph Protection Act, H.R. 1212. I do so because, as currently drafted, this legislation will preclude Orkin and other home-service companies from utilizing the polygraph and other character analyzing tools to protect our customers from employees who would be in a position to use their employment for criminal purposes.

A few minutes ago a question was posed as to why a company spends a lot of money screening their applicants. And I can only speak for our industry, and I can only speak for Orkin. The reason why we do this is for the protection of you as a customer. The uniqueness of the home-service industry is demonstrated by a brief description of the nature of our business. Each month we send thousands of technicians into more than 1.5 million private residents in 43 states. Each time these technicians are granted access to your private residence, our customers lays their trust in our company's judgment as to the character of these employees.

Simply put, an average citizen who would not allow stranger's access to their home are willing to do so if that stranger identify himself or herself as an Orkin employee. We are proud that we have earned that trust throughout the years. At the same time we recognize that our responsibility, both morally and legally, is to continue to utilize the best methods available to protect our customers from the potential dangers arising from the access granted to our customers' homes.

As I stated, we spend over $1 million a year to screen each potential employee to determine whether any such applicant have ever been involved in any criminal activities or exhibit character traits that would create a security risk to our customers. Since 1976, when we first implemented this screening program, we have substantially lower incidence of employees theft and criminal behaviors aimed at our customers.

I may want to produce, Mr. Chairman, for the record two documents in addition to my testimony. Specifically these are cases involving some of our employees that were given a polygraph test voluntarily which they agreed to. And this examination concluded that they were not involved in any wrong doings.

Mr. MARTINEZ. We will submit those for the record without objection.

[Material is held in subcommittee files.]

Mr. MACHO. I think a brief description of our comprehensive screening process would be helpful to this subcommittee. Our screening is both comprehensive and complex. Using the most up-to-date character analyzing tools including polygraph, an investigation is first conducted to determine whether the applicant filled out his application truthfully. The applicant is also given a physical examination to determine whether he or she meets the job's physical requirements. The applicant's motor vehicle report is closely scrutinized. This includes a request by Orkin to every state for any record of traffic violations by that applicant. All applicants are also subject to a psychological examination designed to determine the applicant's attitude and any other job-related circumstances.

Once all of these tests are completed, the applicant is asked to take a polygraph examination to be conducted by a licensed polygraph examiner. This is a voluntary procedure and each applicant who agrees to take a test must sign a waiver acknowledging that he or she is taking this test voluntarily.

Prior to the examination, the examinees are given a list of the questions to be asked and have the opportunity to indicate which questions they do not want to answer. The questions are designed to determine the truthfulness of the information provided by the applicant during the overall screening process. No questions are asked concerning a person's religious or political belief or personal sexual preferences.

I do not feel qualified to answer questions you may have on medical studies that reportedly indicate that a polygraph examination is not an accurate method of determining a person's character. I can only testify today that the polygraph when used as part of an overall comprehensive screening procedure has been effective in our effort to protect our customers from potential dangers.

During the month of February, 38 percent of the 951 applicants with Orkin were completed through employment screening process despite being judged as borderline or deceptive by polygraph examiners.

Mr. MARTINEZ. One minute to wrap up.

Mr. MACHO. During the same time period, a full 60 percent or 154 applicants were rejected because of admissions they made prior to a voluntary test.

I am fully aware that polygraph examinations are now being used by a large number of private employers in a way that minimizes the effectiveness of the technology. It is for this reason that Orkin has been out front in its support of responsible legislation that would adequately protect the rights of both the employee, who is the subject of the polygraph examination, and at the same time the innocent customer that replies on an employment screening process to protect his family and his property.

Unfortunately, the legislation as it is currently drafted addresses only one of these two important concerns. I would urge the committee to revise H.R. 1212 so as to protect all parties involved from a violation of their basic human rights.

Thank you for your patients. This concludes my remarks and I will work with any questions you may have.

[The prepared statement of Nester Macho follows:]

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STATEMENT BY NESTER MACHO BEFORE THE EMPLOYMENT OPPORTUNITIES SUBCOMMITTEE - MARCH 5, 1987

Thank you Mr. Chairman.

My name is Nester Macho. I am a security consultant for Orkin Pest Control, the world's largest structural pest control company and I testify in that capacity today. Orkin is a member company of the National Pest Control Association. I oppose the "Employee Polygraph Polygraph Protection Act", H.R. 1212, that is now before your committee. As currently drafted, this legislation would preclude Orkin and other home service companies from utilizing the polygraph with other character analyzing tools to protect our customers from employees who would be in a position to use their employment for criminal purposes.

Each month, Orkin Pest Control sends thousands of technicians into more than one and one half million private residences in 43 states. The almost unlimited access provided our employees could result in direct threats to the health and well being of our customers, their families, and guests by employees with criminal motives. Each time Orkin technicians are granted access to private residences, our customers place their trust in our company's judgment as to the character of these employees. An average citizen who would not consider allowing strangers access to their home are willing to do so if that stranger identifies himself or herself as an Orkin employee. We are proud of the fact that we have earned that trust through the years. We recognize that our responsibility, both morally and legally, is to continue to utilize the best methods

available to protect our customers from the potential dangers arising from the access granted to our customers' homes.

Orkin spends over $1 million a year to screen each potential employee to determine whether any such applicants have ever been involved in criminal activity or exhibit character traits that would create a security risk to our customers. Since 1976, when we first instituted this screening program, we have substantially lowered incidents of employee theft and other criminal behavior aimed at our customers.

This screening process is both comprehensive and complex, utilizing the most up-to-date character analyzing tools, including the polygraph. An investigation is first conducted to determine whether the applicant filled out his application truthfully. The applicant is also given a physical examination to determine whether he or she meets the job's physical requirements. The applicant's motor vehicle record is closely scrutinized. This includes a request by Orkin to every state for any record of traffic violations by the applicant. All applicants are also subject to a psychological examination designed to determine the applicant's attitude and other job related characteristics.

Once all of these tests are completed, the applicant is asked to take a polygraph examination, to be conducted by licensed polygraph examiners. This is a voluntary procedure and each applicant who

agrees to take the test must sign a waiver acknowledging that he or she is taking the test voluntarily. Prior to the examination, the examinees are given a list of the questions to be asked and have the opportunity to indicate which questions they do not want to answer. The questions are designed to determine the truthfulness of the information provided by the applicant during the overall screening process. No questions are asked concerning a person's religious or political beliefs or a person's sexual preferences.

The length of the examination depends on the applicant's employment history and their responses. Thus, for example, if the applicant is an 18 year old with no prior employment record and no driving record, and no deception is registered during any part of the polygraph examination, that examination may be completed in an hour. However, the examination can take three hours or more when the employee has a prior record of employment that lends itself to a polygraph examination. An examination could also take that long if deception is recorded at any point during the examination. In that case, the examiner will spend a considerable amount of time determining whether that reading is accurate.

While the polygraph has been proven to be effective when administered properly, Orkin does not refuse to hire applicants based solely on a failure in the polygraph test. I believe a review of our experience last month, a typical one at Orkin, will demonstrate that point. During the month of February, 38% of the 951 applicants

Orkin were continued through the employment screening process despite being judged as borderline or deceptive by the polygraph examiners. During that same time period a full 16% or 154 applicants were rejected because of admissions they made prior to voluntarily taking the polygraph examination that they were either habitual drug users or involved in criminal activity. While these applicants may be suitable for other employment positions, the sensitive nature of our business made it imperative for us to reject them.

If the Employee Polygraph Protection Act were law today, we would most likely have hired a large percentage of these 154 unsuited applicants because we would have been precluded from using the polygraph. It is also likely that we might have hired a certain percentage of the remaining applicants who were rejected after both the polygraph and the other examinations concluded that the applicants were unsuited for such a sensitive position. This could have seriously jeopardized the lives or well being of the families that rely on our services.

To my knowledge, thirty-one states have recognized the usefulness of the polygraph, when applied properly, by adopting polygraph laws. Orkin meets and in most cases exceeds all state guidelines. In addition, during last years floor debate on the Polygraph Protection Act, the House implicitly recognized the usefulness of the

when it adopted amendments to allow polygraphs on employees of industries like the child care industry where the health and safety of innocent people are potentially threatened by criminally motivated employees. I wholly agree that these industries need the added protection that a polygraph provides. However, I would suggest that we need not look any further than the home for examples of where life and property are vulnerable. The average customer of the home services industry is asked to allow virtual strangers access to themselves, their children, and their possessions based solely on their reliance on the company name and reputation. Very few customers investigate a company's employee screening procedure before contracting with that company for home services. I do not believe they should be expected to conduct such an investigation. At the same time, I don't think it is necessary for me to suggest different scenerios whereby the criminal element of our society could take advantage of this reliance on a company's judgment.

The passage of "The Employee Polygraph Protection Act" as currently drafted would place a company like Orkin in a dangerous Catch-22 position. The nature of the home service business requires us to ask our customers to trust our judgment as to the character of the technicians we send into that customer's home. However, without the polygraph, we would be precluded from conducting a comprehensive assessment of the employee's character and therefore could not earn the trust of our customers.

Naturally, we want to avoid the damage to our company's reputation and the cost of litigation that would result from an incident involving

one of our employees. In the end, however, it is the customer who would pay for the loss of security if the polygraph is not available. These customers will pay in physical or material losses caused by a technician's abuse of his position, or in the higher costs for services resulting from the company's assumption of the liability for its employees' actions.

In summation, I strongly oppose the Employee Polygraph Protection Act as it is currently drafted because it will prevent companies like Orkin to effectively protect its customers from the potential dangers inherent in the home service industry. I believe the Orkin system demonstrates that, when used properly and in conjunction with other character analyzing tools, the polygraph is an effective tool in the effort to screen our customers from employees who would be in a position to use their employment for criminal purposes. Orkin has repeatedly stated that it is in favor of a responsible alternative to the current regulation of the polygraph industry which would adequately protect the rights of both the employee subject to the polygraph examination and the innocent customer that relies on an employment screening process to protect his interests and the interests of the family. As currently drafted, the legislation now before you would unnecessarily require this innocent people to rely on an employee screening practice which, by law, would be incomplete.

Thank you for your consideration.

Mr. MARTINEZ. Thank you, Mr. Macho.
Mr. Bauer.

STATEMENT OF JON BAUER, STAFF ATTORNEY, LEGAL ACTION CENTER, NEW YORK, NY

Mr. BAUER. Thank you, Mr. Chairman.

My name is Jon Bauer and I am a staff attorney with the Legal Action Center and co-director of the Legal Action Center's polygraph project. The Legal Action Center is a public-interest law firm based in New York City that specializes in discrimination law and employment issues.

I would like to thank the subcommittee for this opportunity to testify today in support of the Employee Polygraph Protection Act.

The Legal Action Center has received hundreds of complaints from men and women who have been denied employment opportunities because polygraph tests branded them as liars and thieves. I would like to start out by sharing with you the experience of just one of these people, a man who I will refer to as Mr. R.

Mr. R was a 26-year old junior manager at a bank in New York City. He had been working there for six years and he had consistently received excellent job performance ratings. When a customer said that money was missing from her account, the bank made all the employees at that branch take polygraph tests. Although there was absolutely no evidence liking Mr. R to the theft, the polygraph examiner decided that he was lying.

Mr. R asked the bank to bring criminal charges against him so that he could have a chance to clear his name in court but the bank simply fired him.

For the next two years, Mr. R looked for jobs at banks and at other businesses without any success. Every time he went for a job interview he had to explain why he was fired from his previous job. No one wanted to hire him once they had heard that he had failed a lie detector. During his two years of unemployment, Mr. R's phone got cut off and he had to go on public assistance so that he could pay the rent on his apartment.

Each week we get calls from people with similar stories; people who have been severely injured in their careers and reputations by the polygraph.

Now it has often been noted that abuses of individual rights occur during polygraph testing. At the Legal Action Center, for example, we have received many complaints from people who were asked intrusive highly personal questions about such matters as marital status, past medical problems and even sexual habits. But I would like to emphasize that most of the harm that is inflicted by polygraph testing is not caused by these abuses. It is caused by problems that are inherent whenever polygraphs are used to make employment decisions.

There are three basic problems with employment polygraph testing—inaccuracy, discrimination and infringement of privacy rights.

The inaccuracy of employment polygraph tests has already been clearly demonstrated in the testimony presented this morning by witnesses from the AMA and the American Psychological Association, so I will not say much more on this subject. The use of these

tests on 2 million workers and job applicants each year inevitably produces massive numbers of false/positive errors. People who tell the truth but are wrongly labeled as liars. It is likely that over 100,000 people each year lose jobs because of the polygraph's mistakes. I think that is reason enough to ban these devices in employment.

Something that is less well known and equally disturbing is that polygraph tests tend to discriminate against particular groups in employment. There is substantial evidence that polygraph screening has a discriminatory effect on minorities. For example, in a lawsuit brought by black prison guard applicants, a federal district court judge ruled that the evidence established a prima facie case that the employer's polygraph tests were discriminating against blacks. The court found that blacks were failing the test at a substantially higher rate than other groups, and agreed with the statistician's testimony that chances were only one in a thousand that such a large proportion of blacks would fail in the absence of discrimination. There is equally strong evidence of discrimination in the case that the Legal Action Center is now working on in federal court.

The shortcoming of polygraph testing can explain this tendency to disadvantaged minorities. First of all, the polygraph measures physiological functions and there is research evidence of ethnic differences in physiological reactivity to stress that may affect the polygraph's validity when it is used on different groups.

In addition, the subjective nature of the tests creates extensive opportunities for conscious or unconscious biases and cultural stereotypes to affect decisions made by polygraph examiners.

The last point that I would like to focus on is that polygraph testing is inherently destructive of workers' privacy and dignity. People who contact our organization after taking polygraph tests, including people who passed, describe it as an intimidating and demeaning experience. Your are forced to sit in a chair with electrodes attached to your finger tips, tubes around your chest and abdomen and a blood pressure cuff wrapped tightly around one arm while a polygraph examiner, the only other person who is in the room with you, asks you accusatory and frequently offensive questions. Workers understandably feel insulted and angry at being required to undergo this ordeal to prove their innocence.

As a congressional subcommittee on the constitution put it 12 years ago, and I quote, "Compulsory submission to a polygraph test is an affront to the integrity of the human personality that is unconscionable in a society which values the retention of individual privacy."

The only effective way to protect workers from the inaccuracy, the discrimination and the indignity of polygraph testing is to enact federal legislation banning their use in the work place. Although 19 states and the District of Columbia has statutes restricting polygraph use, the number of job applicants and employees who are forced to take these tests continues to rise every year. Many employers evade state restrictions by hiring in a state that permits polygraph testing and then transferring the employee. An example of that is described in my written testimony. It is a case of a man who was required to take a polygraph test in New York as a

condition of getting a job with a bank in Maryland, a state that forbids polygraph testing.

For all of these reasons, the Legal Action Center strongly endorses the Employee Polygraph Protection Act without exemptions and urges its swift passage. Indeed, the bill should be strengthened in the way suggested by Mr. Fitzpatrick.

In closing, I would like to thank you again for listening to our views and I would also like to express my gratitude to Mr. Williams, to Mr. McKinney and to the many co-sponsors and supporters of this bill, including the congressman from my home district in Brooklyn, Mr. Owens.

[The prepared statement of Jon Bauer follows:]

PREPARED STATEMENT OF JON BAUER,
STAFF ATTORNEY, LEGAL ACTION CENTER

I am Jon Bauer, a staff attorney with the Legal Action Center and co-director of the Legal Action Center's Polygraph Project. The Legal Action Center is a non-profit, public interest law firm based in New York City that specializes in discrimination law and employment issues. I would like to thank the subcommittee for this opportunity to testify in support of the bill now before you, the Employee Polygraph Protection Act (H.R. 1212).

Our organization has received hundreds of complaints from men and women who have been denied employment opportunities not because they committed any misconduct, not because they were unqualified for the job, but solely because a polygraph examiner looked at some squiggly lines on a chart and pronounced them "deceptive." The Legal Action Center has brought litigation to challenge polygraph abuses, but the vast majority of workers who are forced to take polygraph tests have no legal recourse. Based on our experience with the polygraph's victims, we believe that there is an urgent need for Federal legislation to outlaw the use of the so-called "lie detector" in employment.

The debate on polygraph testing has often focused on abuses. Highly intrusive and personal questions concerning marital status, past medical problems, arrests not resulting in conviction and even sexual habits are frequently asked during polygraph tests. Unscrupulous employers have used lie detectors as a pretext for getting rid of workers because of race, political beliefs or union affiliation. Women have been subjected to sexual harassment during examinations.[1] As long as lie detectors continue to be used in the workplace, such abuses will be impossible to prevent.

The greatest problem, however, is not these abuses, but the ordinary, routine use of polygraph tests as a basis for making employment decisions. Polygraph tests are inherently inaccurate, inherently discriminatory and inherently destructive of privacy and personal dignity. In the testimony that follows, I will share with you the experience of honest, hard-working individuals whose careers and reputations were senselessly destroyed by the polygraph. The evidence is overwhelming that these tests are not accurate --it has been estimated that each year more than 100,000 workers and job applicants are unjustly stigmatized as liars because of the polygraph's errors. Although it cannot tell truth from deception, there is substantial evidence that employment polygraph testing discriminates against racial minorities and other groups. The Legal Action Center firmly believes that Federal legislation like the proposal before this subcommittee is the only effective way to combat the threat to civil rights and fair employment opportunities created by the epidemic of polygraph use in the workplace.

The Polygraph's Victims

Estimates of the number of polygraph examinations administered to employees and job applicants each year range from 1 million to 2.3 million. A survey conducted several years ago found that 20% of major corporations and 50% of banks and retailers used polygraph tests.[2] The complaints received by our organization reflect polygraph use by a wide variety of employers. We have heard from workers who were forced to submit to polygraph tests as a condition of getting or keeping jobs with department stores, banks,

hotels, transportation companies, investment and securities firms, auto mechanics, greeting card shops, jewelers, drug stores, opticians, athletic clubs and restaurants.

The experiences of two of our clients illustrate the fate of workers who are judged deceptive by the lie detector:

■ Mr. R, a twenty-six year old junior manager at a large New York City bank, was required, along with other bank employees, to take a polygraph test when a customer complained that money was missing from her account. The examiner concluded that Mr. R's polygraph charts showed that he was lying. There was no other evidence linking him to the theft or to any other misconduct.

Mr. R had worked for the bank for six years. His job performance evaluations had been consistently excellent. When the polygrapher accused him of deception, Mr. R went to the branch manager and asked to be given another test. He also asked the bank to bring criminal charges against him so that he could clear his name. The bank refused both requests and fired him.

For the next two years, Mr. R looked for jobs with banks and other businesses, but no one would hire him. His phone was disconnected and he had to go on public assistance so that he could pay the rent on his apartment. He finally found employment last summer: a low-paying job in a warehouse.

■ Mr. C, a fifty-eight year old man from Brooklyn, New York, managed the toy department in a department store for thirteen years. He received good performance ratings and had never been accused of theft or dishonesty. In fact, just four months before his polygraph test he received a commendation for preventing a cashier from stealing money.

Mr. C's store decided to institute a policy of requiring all of its employees to take polygraphs. Mr. C has a number of physical problems which can affect the results of a polygraph test: a stutter which makes his breathing erratic, high blood pressure and a nervous condition. Nonetheless, he was required to take the test.

The polygraph examiner determined that there was a "problem" with Mr. C's response to one question: "Have you ever improperly marked down merchandise?" Mr. C was given a second test. The second examiner found no problem with the merchandise question, but decided that Mr. C was deceptive when he said that he had never stolen anything from the store. Although the two polygraph tests contradicted each other, Mr. C was fired.

Mr. C's career has been ruined and his health has deteriorated. He briefly held a job as a toy buyer, but was fired when his boss heard about the polygraph. People he used to work with in the toy business have told him that because he failed a polygraph, no one in the field wants to hire him.

As the cases of Mr. R and Mr. C show, an employee who fails a polygraph test usually encounters great difficulty in finding work elsewhere. Few companies are willing to hire someone who was regarded as dishonest by a previous employer. Applicants are forced to reveal that they failed a polygraph when asked to explain why they left a previous

job. If the applicant does not disclose it, the employer may find out when he or she checks references.

People who have contacted the Legal Action Center after taking polygraph tests--including some who passed--have almost uniformly described it as an intimidating and demeaning experience. The employee or job applicant must sit in a chair with electrodes attached to the fingertips, tubes around the chest and abdomen and a blood pressure cuff wrapped tightly around one arm while an examiner, the only other person in the room, asks accusatory and frequently offensive questions. Workers understandably feel insulted and angry at being required to undergo this ordeal to prove their innocence.

The Systematic Inaccuracy of Polygraph Tests

The polygraph does not detect lies, but merely indicates whether a person is relaxed or tense while answering a series of questions. The machine monitors certain physiological responses: respiration, blood volume and skin resistance to electric current. There is no physiological response specifically and exclusively associated with lying. A person may display signs of physiological arousal during a polygraph examination for reasons totally unrelated to deception, such as feelings of anger and resentment, fear of being falsely accused and terminated, frustration, nervousness or embarassment. There is no support in either psychological theory or scientific research for the notion that a polygraph examiner can tell the difference between stress produced by lying and the stress that an innocent worker feels when he or she is required to respond to the threatening, accusatory questions of a polygraph test.

During the 99th Congress, this subcommittee and its Senate counterpart heard extensive testimony from scientific experts on the invalidity of employment polygraph examinations. A comprehensive research review and evaluation prepared by the Congressional Office of Technology Assessment concluded that scientific evidence does not support the validity of polygraph tests in employment screening situations. The American Psychological Association has stated that the evidence for polygraph test validity is "unsatisfactory" and is "particularly poor concerning polygraph use in employment screening," and a recent report of the American Medical Association's Council on Scientific Affairs finds no adequate validation for personnel screening polygraph tests.[3]

The administration of polygraph tests to more than a million workers each year inevitably produces massive numbers of "false positive" errors--people who told the truth but were wrongly labelled as liars. The studies of polygraph testing in the field that were reviewed in the Office of Technology Assessment's report showed false positive rates (the percentage of innocent people found deceptive) as high as 75% and averaging 19.1%. One extensive study conducted by a prominent advocate of polygraph testing found a 49% false positive rate--examiners called truthful people deceptive nearly half the time.[4]

Even if employment screening polygraph tests were accurate 85% of the time, as some commercial polygraph examiners contend, an intolerable number of Americans would be wrongfully denied employment. For every million workers

who tell the truth during a polygraph test, more than 100,000 of them are falsely accused of lying. And if employment polygraph tests are less than 85% accurate, as the research evidence strongly suggests, even more people lose jobs because of the polygraph's mistakes.[5]

The Polygraph's Discriminatory Impact

The polygraph is unfair to all workers, but also singles out particular groups for discrimination. There is rapidly mounting evidence that employment screening polygraph tests have a substantial discriminatory effect on black job applicants and employees. Certain practices of commercial polygraph examiners also have a tendency to unfairly discriminate against persons with physical or mental disabilities.

In a number of cases, polygraph screening has been shown to disproportionately exclude blacks from employment. Black applicants for correctional officer positions in Cook County, Illinois, in a lawsuit challenging the the county's use of preemployment polygraph tests, proved to the satisfaction of a Federal district court judge that the tests had a substantial adverse impact on blacks. The court noted the strength of the evidence of discrimination in a pretrial ruling:[6]

> [The statistics] demonstrate that a higher percentage of blacks failed the polygraph test than whites taking the same test. In fact, plaintiff's expert correctly determined ... that there was one chance in 1,000 that ... the proportion of blacks who failed the polygraph test would be as great as 72.5% (where 67.5% of those taking the test were black) if blacks had an equal chance of passing the test. ... Based on the statistics, plaintiff has proffered sufficient evidence to constitute a prima facie case of discrimination.

Similar data on the racial impact of polygraph testing has been obtained in another Federal lawsuit in which the Legal Action Center is representing a black department store worker who is challenging an employer's polygraph testing requirement. Over a fifteen month period, during which more than a thousand applicants were tested, 73.4% of whites passed the test, while only 63.6% of blacks passed; a statistician's analysis shows that the likelihood that a disparity this large would occur if blacks had an equal chance of passing is only one in a thousand.[7] The Equal Employment Opportunity Commission and a state fair employment practices agency have also issued determinations finding reasonable cause to believe that polygraph testing by particular employers was having a discriminatory impact on blacks.[8]

The shortcomings of employment polygraph testing as a means of detecting deception can explain the tendency of these tests to disadvantage minorities. First of all, the polygraph is a measure of physiological functions, and there is research evidence of ethnic and group differences in physiological reactivity to stress which may affect the polygraph's validity when used on particular groups. Secondly, the inherent subjectivity of determinations based on the polygraph creates extensive opportunities for conscious or unconscious biases and cultural stereotypes to affect the decisions made by polygraph examiners.[9]

An approach to polygraph testing frequently used by examiners in the commercial sector also puts people who are nervous or have disabilities at a disadvantage. A widely-used training and reference manual for polygraph examiners teaches that "observing the subject's attitude and behavior symptoms" is a crucial aspect of diagnosing truth and deception. Examiners schooled in this "behavior symptoms" approach to lie detection look for signs of deception in the subject's gestures, comments and mannerisms. During the pretest interview, the examiner asks the subject how he or she feels about taking the test and scrutinizes the person's answer for supposed indications of deception. According to this theory, "a lying subject's answer is usually excusatory; he tells of his nervousness or of physical disabilities ...." A person who fidgets, crosses his legs or fails to look at the examiner may also be regarded as deceptive on the basis of this "evasive" behavior.[10]

Not surprisingly, a study assessing the accuracy of polygrapher's judgments based on "behavior symptoms" found that more than 50% of innocent subjects were diagnosed as deceptive.[11] This approach to polygraph testing makes it especially likely that a person who has a physical or mental disability or is exceptionally nervous will fail a polygraph test--especially if the person makes the mistake of telling the polygraph examiner about it!

The Need for Federal Legislation

In the absence of Federal legislation prohibiting the use of the polygraph in employment, more than a million people each year will continue to be subjected to a practice that infringes their privacy and dignity, systematically labels truthful people as liars and discriminates without reason against particular groups. State regulation cannot solve the problem. Although nineteen states and the District of Columbia have statutes restricting polygraph use in the workplace, the number of job applicants and employees who are forced to take the tests as a condition of employment continues to rise each year.

Moreover, the inconsistency of state laws makes for ineffective enforcement. Many employers evade state restrictions by hiring in a state that permits polygraph tests and then transferring the employee into a state prohibiting lie detector use. At a public hearing on polygraph use in New York State, I heard the testimony of a man who was interviewed by a New York City firm that specializes in providing temporary employees to banks and brokerage houses around the country. He was contacted a few weeks later about a job opening at a bank in Baltimore. Maryland prohibits employers from requiring polygraph tests as a condition of employment, but New York does not. The man was told that the Baltimore job was his--but only if he passed a polygraph test administered by a polygraph company in New York City.[12]

The problem of lie detector use in employment is national in scope and requires a national solution. Many private sector employment practices, including such matters as the minimum wage, occupational safety, collective bargaining and mandatory retirement, are extensively regulated by Federal statutes. It is no less appropriate for Congress to address the harm caused by lie detectors in the workplace.

Federal action is particularly appropriate because lie detector testing infringes the basic civil rights of American workers. As another Congressional subcommittee found twelve years ago, "Compulsory submission to a polygraph test is an affront to the integrity of the human personality that is unconscionable in a society which values the retention of individuals' privacy. ... Privacy is a fundamental right that must be protected by prohibitive legislation from such unwarranted invasions."[13] The discriminatory impact of employment polygraph testing on minorities also argues for Congressional action; the elimination of discriminatory practices from the workplace is clearly a matter of Federal concern.

Employers do not need the polygraph. Because of its inaccuracy and destructive effect on employee morale, it is an ineffective and counterproductive way to combat workplace theft. As Dr. Leonard Saxe, the principal investigator and author of the Office of Technology Assessment's report, pointed out in his testimony to this subcommittee in the 99th Congress:[14]

> Polygraph tests may accomplish just the opposite of what is expected. Because exceptionally honest and intelligent individuals may be highly reactive to questions about their truthfulness, such desirable employees will be misidentified at higher rates than other less desirable employees. In addition, highly dishonest employees have available a variety of countermeasures and may be consistently misidentified as honest.

Good management practices, not polygraph testing, help to eliminate theft in the workplace. The many companies that do not use lie detectors, such as Sears, J.C. Penney and General Electric, have not lost any ground to competitors. Businesses have done very well without polygraphs in the States that restrict their use, including California, Iowa, Vermont, Michigan and Montana. Federal legislation will benefit millions of working people without harming employers.

For these reasons, the Legal Action Center strongly endorses the Employee Polygraph Protection Act and urges its swift passage. Thank you for holding these important hearings and for listening to our views.

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8. EEOC Decision No. 79-44 (Feb. 23, 1979); State of New York, Division of Human Rights, Determination After Investigation in Case No. 1a-E-R-82-82209E (Sept. 19, 1985).

9. O.T.A. Memorandum, at 86 ("Research conducted cross culturally ... indicates that there are ethnic differences in response to stress. Such differences may, in turn, affect detection of deception."); A.M.A. Council Report, at 1174 ("Ethnic and group differences ... may affect validity but have not been studied; however, the impact of ethnic biases on the subjective interpretations made by the examiner cannot easily be excluded."); Sackett, P. R. and Decker, P. J., "Detection of Deception in the Employment Context: A Review and Critical Analysis," Personnel Psychology, Vol. 32, at 498-99 (1979) (noting that there is

research evidence of ethnic differences in physiological reactivity to stress that could affect the accuracy of test results for different groups, and discussing "the potential for factors such as first impressions, prejudices, and stereotypes to consciously or unconsciously affect the overall judgment made by the examiner.").

10. Reid, J. E. and Inbau, F. E., Truth and Deception: The Polygraph ("Lie-Detector") Technique, 2d ed. (Baltimore: Williams & Wilkins Co., 1977), at 13, 17-20; Horvath, F. S., "Verbal and Nonverbal Clues to Truth and Deception During Polygraph Examinations," Journal of Police Science and Administration, Vol. 1, at 144 (1973).

11. Raskin, D. C., Barland, G. H. and Podlesny, J. A., Validity and Reliability of Detection of Deception (Washington, D.C.: U.S. Department of Justice, National Institute of Law Enforcement and Criminal Justice, June 1978), at 25 ("[D]ecisions based on behavioral cues produced more than 50% incorrect designations of innocent subjects as deceptive. Unfortunately, many examiners are taught to place great emphasis on gestures, verbal behavior, and mannerisms in arriving at a decision.").

12. Attorney General of the State of New York, Public Hearing on the Use of Polygraph Examinations in Employment (Rochester, New York, Mar. 21, 1985) (statement of Carl L. Nudo).

13. Staff of the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 93rd Cong., 2nd Sess., "Privacy, Polygraphs, and Employment," at 17-18 (Comm. Print 1974).

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Mr. MARTINEZ. Thank you, Mr. Bauer.

We will now hear from Joseph O'Neill, Director of Police of Conrail on behalf of the Association of American Railroads.

STATEMENT OF JOSEPH O'NEILL, DIRECTOR OF POLICE, CONRAIL, ON BEHALF OF ASSOCIATION OF AMERICAN RAILROADS

Mr. O'NEILL. Mr. Chairman and members of the committee, my name is Joseph O'Neill. I am presently Director of Police for Conrail, and I have served as police commissioner for the city of Philadelphia. I am here representing the Association of American Railroads and the 3300 sworn police officers within the United States who serve as members of the railroad police department of AAR-member railroads.

The purpose of my statement is to express the concern felt by the AAR, its member railroads and their police officers about H.R. 1212. We feel the bill's total prohibition, total prohibition on the private sector use of polygraph testing, along with the failure of the bill to extend an exemption to testing to para-public police officers such as the railroad police will have a serious adverse impact on the ability of the nation's railroads to adequately protect and assure the security and integrity of our rail transportation system.

Railroad police are statutorily authorized law enforcement officers who are appointed or commissioned by the government of the state and/or approved by the state attorney general or a senior law enforcement official. In most states, railroad police are granted full power, police powers equivalent to those conferred upon the police of the state or its municipalities or sheriffs of counties.

As such, we are fully empowered to enforce all state criminal laws on the property of the railroad companies employing them, and in many cases in a county in which the railroads operate. In most states, railroad police have state-wide jurisdiction.

Generally railroad police receive training and certification equivalent to their governmental counterparts. They have primary jurisdiction for investigating crimes involving the railroads and work closely with state and federal law enforcement authorities to prosecute criminal activity. When necessary, they are available to assist and back up local governmental police officers.

The only significant difference between regular governmental police officers and railroad police officers is their source of compensation.

The police chiefs and officers of our railroad police departments recognize that there are serious problems with misadministration of polygraph tests, and the misuse of the results of these tests throughout the states. We agree that corrective action is appropriate and necessary to eliminate the misuse of these tests.

We are not opposed to government regulation of polygraph operators and equipment. However, we are opposed to a total banning of the polygraph in a manner which will remove a useful tool from the arsenal of the professional police officer who has a legitimate need for it as an investigative tool.

Generally, most of the railroad police departments use polygraph testing on a rare and selective basis in investigating criminal activity. We are not aware of any railroad police department that uses

polygraph testing as a pre-employment screening device. It is our contention that railroad police departments use polygraph testing in a very responsible and professional manner comparable to our public counterparts and should continue to be able to use this valuable resource.

In further support of our position, I offer the following points.

Polygraph testing is offered on a completely voluntary basis by railroad police and allows those innocent suspects to exculpate themselves. Testing is not done on a random basis but only when a person is suspected of or is believed to possess relevant information concerning a specific crime. The railroads have no inclination to conduct such "searches" of its employees without identifiable cause.

Related to that is the effort of railroad police to refrain from fishing expeditions. Polygraph testing is used to obtain corroborative evidence and is never the basis for a railroad's principal case against a suspect. The suspect retains all the due process rights he has coming under the American criminal justice system.

Finally, national security concerns which explain in part the exception for governmental units in Section VI in H.R. 1212 also apply to the railroads. At present, the railroads transport a great quantity of hazardous materials, including nuclear waste. In the future, the nation's railroads will be looked upon to carry strategic nuclear weapons. The dangers inherent in such cargo require vigilance from those charged with protecting the railroad's property.

To make the most effective use of railroad police, it is essential they have at their disposal every possible probative investigative tool.

Towards this end, the AAR requests that railroad police be accepted in the general prohibitions contained within House Bill 1212 as to the use of polygraph tests and be shown the same consideration as their public police counterparts.

I will be happy to answer any questions the subcommittee may have. Thank you for hearing us.

[The prepared statement of Joseph O'Neill follows:]

STATEMENT
OF
JOSEPH O'NEILL

DIRECTOR OF POLICE
CONRAIL

BEFORE THE HOUSE EDUCATION & LABOR
SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES

March 5, 1987

Mr. Chairman and members of the Committee, my name is Joseph O'Neill. I am presently Director of Police for Conrail and have served as Police Commissioner for the City of Philadelphia. I am here representing the Association of American Railroads (AAR) and the 3,300 sworn police officers within the United States who serve as members of the Railroad Police Departments of AAR member railroads. The purpose of my statement is to express the concern felt by the AAR, its member railroads, and their police officers about H.R. 1212. We feel the bill's total prohibition on the private sector use of polygraph testing, along with the failure of the bill to extend an exemption for testing to para-public police officers such as the railroad police, will have a serious adverse impact on the ability of this nation's railroads to adequately protect and assure the security and integrity of our rail transportation systems.

Railroad police are statutorily authorized law enforcement officers who are appointed or commissioned by the governor of a state and/or approved

by the state attorney general or a senior state law enforcement official. In most states, railroad police are granted full police powers equivalent to those conferred upon the police of the state or its municipalities, or sheriffs of counties. As such, they are fully empowered to enforce all state criminal laws on the property of the railroad companies employing them and, in many cases, in the counties in which the railroads operate. In most states railroad police even have state-wide jurisdiction. Generally, railroad police receive training and certification equivalent to their governmental counterparts. They have primary jurisdiction for investigating crimes involving the railroads, and they work closely with state and federal law enforcement authorities to prosecute criminal activity. When necessary, they are available to assist and back-up local governmental police officers. The only significant difference between regular governmental police officers and railroad police officers is their source of compensation.

The police chiefs and officers of our railroad police departments recognize that there are serious problems with the misadministration of polygraph tests and the misuse of the results of these tests throughout the states. We agree that corrective action is appropriate and necessary to eliminate the misuse of these tests. We are not opposed to government regulation of polygraph operators and equipment. However, we are opposed to a total banning of the polygraph in a manner which will remove a useful tool from the arsenal of the professional police officers who have a legitimate need for it as an investigative tool.

Generally, most of the railroad police departments use polygraph testing on a very rare and selective basis in investigating criminal

activity. We are not aware of any railroad police department that uses polygraph testing as a pre-employment screening device for railroad employees. It is our contention that railroad police departments use polygraph testing in a very responsible and professional manner, comparable to our public counterparts, and should continue to be able to use this valuable resource.

In further support of our position I offer the following points:

1. Polygraph testing is offered on a completely voluntary basis by railroad police and allows those innocent suspects to exculpate themselves.

2. Testing is not done on a random basis, but only when a person is suspected of, or is believed to possess relevant information concerning, a specific crime. The railroads have no inclination to conduct such "searches" of its employees without identifiable cause.

3. Related to that is the effort of railroad police to refrain from "fishing expeditions." Polygraph testing is used to obtain corroborative evidence and is never the basis for a railroad's principal case against a suspect. The suspect retains all the due process rights he has coming under the American criminal justice system.

4. Finally, national security concerns, which explain in part the exception for governmental units in Section 6 of H.R. 1212, also apply to the railroads. At present the railroads transport a great quantity of hazardous materials, including nuclear wastes. In the future the nation's railroads will be looked to carry strategic nuclear weapons. The dangers inherent in such cargo requires vigilance from those charged with protecting a railroad's property. To make the most effective use of railroad police it is essential they have at their disposal every possible probative investigative tool.

Towards this end, the AAR requests that railroad police be excepted from the general prohibitions contained within H.R. 1212 as to the use of polygraph tests.

That completes my prepared testimony. I shall be happy to answer any questions the Subcommittee may have.

Mr. MARTINEZ. Thank you, Mr. O'Neill. Let me start my questions with you.

Why does Conrail or the Association not use polygraph tests for pre-screening—for pre-employment screening?

Mr. O'NEILL. We are a multi-state roads, interstate, involved in interstate transportation. The individual states that we go through have, of course, individual polygraph laws. Therefore, we are guided by the laws of the individual states that we go through and we feel it would be inappropriate for us to be able to polygraph somebody in Pennsylvania, for example, and not be able to do the same thing in Michigan. So in a sense, it is what is good for the goose is good for the gander.

Mr. MARTINEZ. There was one particular case which suggested to me that sometimes a more careful other kind of search than a polygraph would result in the same thing that a polygraph does, but probably more effectively. The case in point is Gates. He should have been suspended on several occasions when in his past history it was determined that he had done certain things that would prove him really irresponsible in having the responsibility of an engineer on the train, especially a drunk driving violation.

As I sat here today and listened to this testimony, it struck me that the person from the Department of Justice asked why do employers use polygraphs if they are not that reliable. Well, it suddenly dawned on me in something that Mr. Macho said. It is the easiest and it is the cheapest.

Let me go to you, Mr. Macho. You claim that you spend $1 million per year in screening employees.

Mr. MACHO. Yes, sir.

Mr. MARTINEZ. But that $1 million is not used totally for polygraphs. What I would like to know is what percentage of that $1 million is used for polygraphs, because you indicated in your testimony that you do extensive screening. And so I am led to believe that there are other things that you do besides just the polygraph. In fact, you say in your testimony that you do not use just the polygraph.

Mr. MACHO. That is correct.

Mr. MARTINEZ. What percentage of that money and percentage of the intense screening that you do involves the polygraph?

Mr. MACHO. That $1 million that I have reference to is strictly used for polygraph.

Mr. MARTINEZ. Strictly used for polygraph.

Mr. MACHO. Yes, sir.

Mr. MARTINEZ. And how much do you use for total screening?

Mr. MACHO. I would say in the neighborhood of about another $3 million or so in relation to physical examination, drug testing, tests that we use, motor vehicle reports and psychological testing.

Mr. MARTINEZ. And you do background searches.

Mr. MACHO. Yes, sir.

Mr. MARTINEZ. So there is a whole lot of things you do, any one of those could lead you to the conclusion that you should not hire a person even without the use of the polygraph.

One of the things that you said in your testimony that is inconsistent or contradictory is you state that during February a full 16

percent, or 154 applicants were rejected because of admissions they made prior to voluntarily taking the polygraph examination.

Mr. MACHO. That is correct.

Mr. MARTINEZ. This means that you determined that 154 ineligible for employment based on statements made, not the polygraph test. Then you say in your testimony, "If the polygraph protection act were law today, we would most likely have hired the large percentage of those 154." You said without the polygraph you rejected 154.

Why would this law keep you from doing the same thing?

Mr. MACHO. I am not quite sure I understand your question, Mr. Chairman.

Mr. MARTINEZ. Well, you state that——

Mr. MACHO. But let me try to answer that.

Mr. MARTINEZ [continuing]. You rejected 154 independently of any polygraph test. That is what you state in your testimony. And then later you state that if this law were in place, that you probably would have hired the 154.

Mr. MACHO. Without the use of the pre-employment polygraph examination which consists of a pre-test interview and so forth and so on.

Mr. MARTINEZ. Yes, but that is not what you say in your testimony. You said—you rejected these people prior on admissions they made——

Mr. MACHO. Yes, that is correct.

Mr. MARTINEZ [continuing]. Prior to the test. You rejected them on those admissions prior to the test.

Mr. MACHO. At the time prior to the test was conducted, but at the time they were talking to the polygraph examiners. They were already at the polygraph examiner place of business. These were admissions——

Mr. MARTINEZ. But they were admissions that were made without benefit of the polygraph test.

Mr. MACHO. That is correct; yes, sir.

Mr. MARTINEZ. If you were to reject them on that basis, whether you gave them a polygraph test had no relevance.

Mr. MACHO. I am not so sure, Mr. Chairman, that I agree with that. I think that perhaps once a person——

Mr. MARTINEZ. Well, your testimony is recorded that way and I would suggest that if you want to revise that portion of your testimony, we will leave the record open for two weeks.

Mr. MACHO. All right, sir.

Mr. MARTINEZ. But there is a contradiction there.

Mr. Williams.

Mr. WILLIAMS. Thank you, Mr. Chairman.

Maybe one of the reasons that Congress might refuse to pass a ban, either full or partial, on polygraphs, is that we will have, heaven forbid, some catastrophe or tragedy occur just prior to this bill being voted upon. That is what moves Congress. As you know, it is not the way to run the railroad, Mr. O'Neill, but that is what happens around here.

And I cannot help but think of the Conrail tragedy, Mr. O'Neill with our being here, perhaps the drama of that is one of the reasons that you were invited. But as the Chairman indicated, the Na-

tional Transportation Board has said that the engineer had traces of marijuana found in his blood and urine, had been suspended twice for alleged safety infractions once for 30 days for allegedly running a stop signal and had been arrested apparently a month before for an incident on a drunk driving charge. You did not need a polygraph for that fellow. I do not want to assume that he is innocent or guilty of any of these things, including any negligence on the accident.

But it would seem to me that a proper personnel policy would have sent up the red flare on that particular employee. When we rely on polygraphs, we develop a blind belief that it will solve our personnel problems, and that, I submit, is how we get into accidents like Conrail.

Just use the example, Mr. Macho, of your company which is making a meaningful effort to hire employees that people like me who bring them into their homes can trust, and I appreciate that your doing that. You mention that out of 951 applicants, just to use this specific case for the demonstration of what I am trying to show here. Out of 951 applicants, the lie detector tests said to your company 590 of these people are okay.

Now if you take an 85 percent valid rate, that is, a 15 percent error rate, that means that you might have turned 88 people loose who really had criminal intent. You might have turned them loose on America.

Now you do not do that intentionally. That is exactly what you do not want to do, but because you rely on this gadget that does not work, you are not achieving what you are intending to achieve with your company. Because people who haul toxic chemicals believe and understand that that is a danger to citizens on the roadways and nearby, they want to give truckdrivers lie detector tests. Because these tests are not valid we could have people out there driving toxic chemicals that should not be driving them. You see that is my point. The test is not valid. We are relying on a gadget that does not work and it is impaling the safety of the American people.

When we say to the Federal government that you can use the polygraph test, we say that under a very restrictive condition and only if you use it together with a lot of background screening. We tell them you have to do it with other things. Why? Because a spy can go through a lie detector test like water through a sieve. We imperil the public on these tests, and it seems to me that we have got a lot of false belief in them. I think it is endangering our society and that is one of my great objections to them.

If I may conclude, Mr. Chairman, another objection, Mr. O'Neill, that I have to them is based on something that you said on page three of your testimony and that is, "Polygraph testing is offered as a completely voluntary basis by railroad police and allows those innocent suspects to exculpate themselves."

Well, that turns the constitution on its head. You do not have to prove that you are not guilty in America. Somebody else has to prove you are. And you are saying, we are going to allow them the chance to prove that they are not guilty. Well, that is not how America works.

Mr. O'NEILL. Very respectfully, sir, I see no harm in that.

Mr. WILLIAMS. Well, the Constitution of the United States does, the judicial system does.

Mr. O'NEILL. I do not know that the majority of the people of America do.

Mr. WILLIAMS. Well, I know, but I saw a poll the other day said that the majority of the American would people give up six of the 10 Bills of Rights, so my founding fathers wisely made it very difficult to give up the 10 Bill of Rights.

Well, thank you, Mr. Chairman.

Mr. MARTINEZ. Thank you, Mr. Williams. Mr. Owens.

Mr. OWENS. Mr. Macho, do you administer polygraph tests yourself? Are you a licensed technician?

Mr. MACHO. I have been, yes, sir. I am, but I do not do it myself.

Mr. OWENS. You have done it in the past though.

Mr. MACHO. Yes, sir, for approximately 15 years.

Mr. OWENS. In order to get a license, do you agree to a standardized procedure when you are administering tests? Must all testing follow a certain standardized procedure? Where are you licensed?

Mr. MACHO. I am licensed in 16 states, but my original license came from the state of Texas. But each state that requires a license, Mr. Owens, may be a totally different exam, a totally different license requirement is what I am saying.

Mr. OWENS. There are no standardized procedures, for example, which would say you cannot ask a person a question something highly personal about his sex life one minute and then the next minute ask him did you do it or did you not do it in terms of whatever you are trying to get at; did you steal the ring or did you not, after you have just asked him a highly personal question that might have aroused anger or shame or they would be reacting emotionally, and then you ask another question, the question about the crime. Is that kind of thing regulated, or prohibited, or forbidden, or is the polygraph examiner free to do anything he wants to in terms of sequence of questions?

Mr. MACHO. No, there is techniques, there are different techniques used, Mr. Owens. But basically the polygraph examiner is allowed to ask only questions that are related to that specific issue.

Mr. OWENS. Most licensing requirements say that you can only ask questions related that that specific issue?

Mr. MACHO. That is correct. If you are dealing with a criminal investigation, that covers that.

Mr. OWENS. So the model situation that Mr. Darby had in Georgia, Georgia is supposed to have a model law.

Mr. MACHO. That is correct.

Mr. OWENS. Mr. Darby had a situation where they left completely discussions of his own behavior and required him to begin discussing the behavior of other people. That was probably a violation of the Georgia model law licensing?

Mr. MACHO. Well, Mr. Owens, as you well know, there is always two sides to every one. I am not disputing the event that took place with Mr. Darby. I do not know all the details about what took place with Mr. Darby.

I can assure you that under normal circumstances the description of what he has given, I would like to listen to the other side.

In other words, I would like to see what that polygraph examiner may have to say and I would also like, and I question the reason why Mr.—in the state of Georgia, which I am not familiar with the law.

Mr. OWENS. You are not licensed there.

Mr. MACHO. I am licensed in Georgia, but I am not totally familiar with the state of Georgia inasmuch as I do not live in Georgia and it changes constantly.

In the state of Texas, and I can state very freely on that, right there on your statement, or on the signed release that you sign it tells you exactly who to contact in case you have a complaint which is a Board of Polygraph Examiners in the state of Texas, which is the one that regulates the behavior on the part of all the polygraph examiners in the state of Texas. It is extremely competent and they do a superb job in regulating the attitude and the background of the examiners.

Mr. OWENS. I understand all doctors who do psychoanalysis have to undergo psychoanalysis themselves. Do all licensed polygraph examiners have to take polygraph tests themselves first?

Mr. MACHO. We have in the state of Texas. When I went to polygraph school——

Mr. OWENS. Is that a requirement?

Mr. MACHO. Yes, sir. When I went to polygraph school, I had to take a polygraph examination in order to——

Mr. OWENS. I am not asking that. In order to get your license, was it a requirement that one must take——

Mr. MACHO. No.

Mr. OWENS [continuing]. A test and pass it?

Mr. MACHO. Not a polygraph examination. A written exam, yes.

When I got my license in 1974, I had to serve, and this is the way I had to do it, I went to a polygraph school which was a school for 12 weeks of training. I then serve under a polygraph examiner which had to be licensed for two years, for a period of six months. Then I appear in front of the board and I took a written exam, which was three parts to the exam, and then I passed the exam and then I obtained my license.

Mr. OWENS. These employees that you test for Orkin.

Mr. MACHO. Yes, sir.

Mr. OWENS. Do you only send them into states that do not prohibit polygraph tests? Are any of these employees working in Maryland, for instance?

Mr. MACHO. Well, sir, we do not do that. There is three types of states to date that are basically—we are looking at. We are looking at states where polygraph is voluntary. We are looking at states were polygraph can be required. And we are looking at states where polygraph is totally illegal. And I think that was in reference to—I believe you were saying, for instance, in the state of Michigan, you cannot conduct polygraph examinations, nor can you in New Jersey. But by the same token, in the state of Texas, you can.

So we comply with each state law. We send our applicants to be tested only in those states where they volunteer to take a test. If they volunteer to take a test, we will have them take a polygraph examination. If they do not volunteer to take a test, we hire many

people that do not take a polygraph examination. We do not keep them from obtaining a job simply because they do not take a polygraph examination.

Mr. OWENS. Mr. Bauer, one question. Is it illegal to have people sign waivers which waive their right to sue, any of their basic right?

Mr. BAUER. Well, my understanding is that usually just having the person sign such a waiver may or may not be illegal per se, depending on the law in the state that you are in. But a waiver of the right to sue may not be enforced by courts in many states if in fact signing that waiver was a condition of keeping the job.

But I would add that the ability to sue under current state laws is not at all an adequate remedy for most people who are victimized by the polygraph. Someone can bring a claim that the polygraph examiner was negligent, or that the employer defamed them. But bringing that kind of suit puts the individual in position of having to go to court and prove his or her innocence. The burden is on the person bringing the lawsuit to show that they did nothing wrong. And it is a costly process. Most people cannot afford lawyers. Even if you do have a lawyer, it takes years to get anything. And the only redress that you usually get is some monetary compensation.

Mr. R, whose story I told in my testimony, ultimately settled the case for $12,000. All that has done is that it has helped him pay the bills for the two years that he was out of work. His career is still ruined, and his employment opportunities are very, very limited now.

So I think state law remedy, remedies in court in the absence of a total prohibition on polygraph testing just do not provide any sort of an adequate remedy.

Mr. OWENS. There have been no class action suits in this area?

Mr. BAUER. Well, in the area of a discriminatory effect. There has been some litigation under Title 7 of the Civil Rights Act, and that led to the uncovering of the evidence that I mentioned. None of those cases have resulted in actual decision after trial. The one I mentioned in Chicago settled with the employer agreeing to stop its use of polygraph testing. The case that the Legal Action Center is working on that has uncovered similar statistics showing racial discrimination has not yet gone to trial.

Mr. OWENS. Thank you. No further questions, Mr. Chairman.

Mr. MARTINEZ. Thank you, Mr. Owens.

Has the Texas Board of Examiners ever suspended anyone, any polygrapher?

Mr. MACHO. Yes, sir. To my knowledge, they have, they certainly have.

Mr. MARTINEZ. Do you know how often?

Mr. MACHO. They have revoked licenses and they have suspended. I am not in a position to give you specifics inasmuch as I am not a member of the board. But I do know they have indeed suspended and revoked licenses; yes, sir.

Mr. MARTINEZ. You have a nationwide company that provides service in how many states?

Mr. MACHO. Orkin, we are in 43 states.

Mr. MARTINEZ. Forty-three states.

Mr. MACHO. Yes, sir.

Mr. MARTINEZ. And in that number of states, you encounter the three situations that you found with states that do not allow licensing?

Mr. MACHO. Yes, sir.

Mr. MARTINEZ. In those states, you do not polygraph?

Mr. MACHO. That is correct.

Mr. MARTINEZ. And you hire without the polygraph?

Mr. MACHO. Yes, sir. We have started using drug testing.

Mr. MARTINEZ. Okay. Can I ask you, if it is at all possible——

Mr. MACHO. Yes, sir.

Mr. MARTINEZ [continuing]. And if it is not too much of an inconvenience, it would be very helpful to the committee, to provide for us what the difference in losses are for those three different situations?

Mr. MACHO. I have it right here.

Mr. MARTINEZ. You do have it.

Mr. MACHO. Yes, sir.

Mr. MARTINEZ. Is it a part of your testimony?

Mr. MACHO. No, sir.

Mr. MARTINEZ. I did not see it in your testimony.

Mr. MACHO. No, sir.

Mr. MARTINEZ. Is that the one you suggested you wanted offered as subordinate to your testimony?

Mr. MACHO. I was hoping you would bring that point up, Mr. Chairman.

Mr. MARTINEZ. Well, we will take that and the committee will study that as a part of your testimony.

Mr. WILLIAMS. Would the Chairman yield on that point?

Mr. MARTINEZ. Yes.

Mr. WILLIAMS. Some people that are assisting me in the research that I have done have called a number of states, including Texas, and asked them if they have suspended anyone as well as how many complaints they have had. And although I must say, Mr. Chairman, that I am not certain over what time frame this is, the Texas Board responded that they had suspended no one.

Mr. MARTINEZ. Is this a part of the record too?

Mr. WILLIAMS. I would be pleased to make this part of the record.

Mr. MARTINEZ. Would you, please? We will accept that into the record with no objections. So ordered.

Again I want to thank you for coming and testifying today. It is invaluable, your help, and we appreciate it. Thank you very much.

With that, we adjourn.

[Whereupon, at 1:40 p.m., the subcommittee was recessed.]

POLYGRAPH TESTING IN THE PRIVATE WORK FORCE

THURSDAY, APRIL 30, 1987

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES,
COMMITTEE ON EDUCATION AND LABOR,
Washington, DC.

The subcommittee met, pursuant to recess, at 9:06 a.m. in room 2261, Rayburn House Office Building, Hon. Matthew G. Martinez (chairman of the subcommittee) presiding.

Members present: Representatives Martinez, Gunderson, Owens, Williams, Hayes, Jontz, Henry and Grandy.

Staff present: Eric Jensen, staff director; Valerie White, legislative assistant; Carole Stringer, committee legislative associate; Don Baker, committee counsel; Mark Powden, minority staff director; Mary Gardner, minority legislative associate; and Tammy Harris, clerk.

Mr. MARTINEZ. It is six minutes after the hour. I am told that Charley Hayes is on his way and should be joining us any moment now, so I'm going to ask the first two witnesses, Mr. Scheve and Mr. Fanning, to come forward and take their place on the podium. I will start by giving my opening statement which the Members have already heard time and time again. It's nothing new to them.

Let me start out by saying that the purpose of this hearing this morning is to hear testimony from people that were not able to testify at the last hearing that we had. This is in deference to Mr. Gunderson, who felt that at least these two groups ought to be heard on the matter before we actually had markup.

Let me say that we have heard testimony on this issue time and time again, and I hope that the testimony this morning can shed new light on the subject. This situation has been around for at least 20 years. Mr. Jack Brooks from Government Operations was the first one to hold hearings on this, and subsequently Birch Bayh in the Senate. There are still going to be those people that believe, on one side, that the polygraph is a worthless black box, and those other people that believe that this is a necessary instrument for them to be able to protect the people that they serve and make sure that the people they hire are of a honest nature and are the kinds of people that should be in that job.

[The prepared statement of Hon. Matthew G. Martinez follows:]

PREPARED STATEMENT OF HON. MATTHEW G. MARTINEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

This hearing of the Employment Opportunities Subcommittee is called to hear additional testimony on the issue of the use of polygraphs and to conduct a markup on H.R. 1212 immediately following.

A previous hearing was held on this legislation on March 5 of this year at which time we heard from the American Medical Association, the American Psychological Association, the Justice Department, legal experts, private groups, and from a victim of polygraph abuse. A similar bill, H.R. 1524 passed out of this same subcommittee last Congress unanimously, and later passed the House with amendments.

The issue that this subcommittee must weigh is whether an instrument which measures stress, the validity of which has been questioned, should be banned from the workplace, or, be allowed to be used by employers to stave off growing employee thefts. Testimonies have been heard from both sides on the matter, including today, and the members of this subcommittee will decide what type of legislation is needed. This is an important issue affecting over 2 million Americans annually which requires careful consideration and thoughtful response.

Mr. MARTINEZ. I'm waiting so that we can have the necessary Members to start without being challenged by someone that we held an illegal hearing. I think we'll just have to wait a few more minutes.

The ranking minority member of the committee is joining us now, Steve Gunderson from Wisconsin.

Let me just say, Mr. Gunderson, that I gave a short opening statement in the interests of time, and I would defer to you now if you would like to make a statement.

Mr. GUNDERSON. No problem, Mr. Chairman. Just proceed.

Mr. MARTINEZ. All right, then, let's hear from Mr. Fanning to begin with.

STATEMENT OF JOSEPH FANNING, VICE PRESIDENT, WELLS FARGO GUARD

Mr. FANNING. Mr. Chairman, members of the subcommittee, my name is Joseph Fanning. It is my pleasure to appear before you this morning and discuss the use of polygraphs in the private protective security industry.

For the past eight years I have been District Manager and Vice President of Investigations for Wells Fargo Guard Services. Prior to joining Wells Fargo I served for 28 years as an agent in the Federal Bureau of Investigation. For 26 years, I was an agent and a supervisor in the New York City office of the FBI.

Last year, when H.R. 1524 was considered, the House of Representatives accepted an amendment offered by Mr. Biaggi and Ms. Roukema which recognized the need for polygraphs in the private protective security industry. The amendment was included in the bill for a very simple reason, the public safety. We believe that amendment was very important and we would urge the subcommittee to include its language as it considers polygraph legislation again this year.

The private security industry is engaged in very sensitive missions. It performs critical functions in protecting the public safety and, in many instances, our national security. It is a logical extension of our governmental security services, and we believe it should be provided with the tools necessary to perform as effectively as the governmental security services. One of these tools is the polygraph for both pre- and post-employment screening. Congress has

consistently voted to make the polygraph available to Government agencies involved in protecting the public, and rightly so. We believe the Congress should also make polygraphs available to our industry.

As I stated, Mr. Chairman, our mission is often very sensitive. Private security guards protect nuclear power plants and our Nation's Strategic Petroleum Reserve. We also transport huge amounts of money and guard classified information, negotiable securities and dangerous drugs, and protect hundreds of local utilities.

The nature of our business, Mr. Chairman, makes us a prime target for infiltration by criminals and terrorists. This is why pre-employment screening is so critical. Just as a post-employment polygraph is of no assistance in repairing the damage caused by a Soviet spy who has infiltrated an intelligence agency and given away critical secrets, post-employment polygraphs are of no assistance if a nuclear power plant has been sabotaged or a water supply poisoned by a terrorist who has infiltrated a private security company.

The threat of terrorism is not imaginary, Mr. Chairman. We face it regularly. In 1983, for example, a terrorist infiltrated a Wells Fargo Armored Service in Connecticut, a State that does not permit pre-employment polygraphs. He fled the country after stealing $7 million. There was no need for a lie detector test after the fact; he was gone. According to the FBI, the money was used to purchase explosives and weapons which were used in terrorist attacks in San Juan, Puerto Rico.

Mr. Chairman, the most important use of the polygraph in our industry is to screen out those who apply for sensitive job positions with criminal motives. Qualified polygraph examiners can accurately detect deception in answers to specific questions aimed at motivation and past criminal record, and we need to have them do so.

Mr. Chairman, we commend you for your concerns regarding the improper use of the polygraph. There is no question that a lie detector can be used abusively. I would like to emphasize, however, that we make every effort to be sure that abuses do not occur in the private protective security industry.

Individuals applying for jobs in our industry are well aware that they are applying for sensitive positions. They know there will be background investigations. They know that there will be polygraphs, yet they voluntarily apply for the jobs which will require such scrutiny.

We believe we properly administer the tests. At no time does applicant screening involve any question regarding religion, attitude toward unions, political beliefs, sexual behavior, or other personal issues. The polygraph simply is not an instrument of intimidation in our industry.

Mr. Chairman, I have attached to my testimony a copy of an amendment which was agreed to last year. I urge the subcommittee to adopt this provision. I sincerely believe it is critical to our ability to protect the public safety.

Thank you.

[The prepared statement of Joseph Fanning follows:]

STATEMENT OF

JOSEPH FANNING

ON BEHALF OF

BORG-WARNER CORPORATION

My name is Joseph Fanning. It is my pleasure to appear before you this morning and discuss the use of polygraphs in the private protective security industry.

I am vice president for Wells Fargo Guard Services and have been associated with Wells Fargo for 8 years in both the guard and investigative service operations. Prior to joining Wells Fargo, I served for 28 years as an agent in the Federal Bureau of Investigation, both as an agent and a supervisor in the Criminal Division.

Wells Fargo Guard Services, Wells Fargo Armored Services and Burns International Security Services are wholly owned subsidiaries of the Borg-Warner Corporation. The companies operate in 44 states and Puerto Rico. They employ over 55,000 people. In the armored business, we operate 1,200 armored trucks and vehicles servicing the Federal Reserve, the Bureau of Engraving, financial institutions, including money room services and automatic teller machines, and commercial/retail establishments. On any given day, Wells Fargo will handle $1 billion through transportation, inventory and storage services.

Last year, when H.R. 1524, the Polygraph Protection Act was considered, the House of Representatives accepted an amendment offered by Mr. Biaggi and Mrs. Roukema which recognized the need for polygraphs in the private protective security industry. The amendment was included in the bill which passed the House for a very simple reason: The Public Safety. We believe that amendment was very important, and we would urge the subcommittee to include its language as it considers polygraph legislation again this year.

The private security industry is engaged in very sensitive missions. It performs critical functions in protecting the public safety and in many instances our national security. It is a logical extension of governmental security services, and we believe should be provided with the tools necessary to perform as effectively as governmental security services. One of these tools is the polygraph for both pre- and post-employment screening. Congress has consistently voted to make the polygraph available to governmental agencies involved in protecting the public, and rightly so. We believe the Congress should also make polygraphs available to our industry.

As I stated, Mr. Chairman, our mission is often very sensitive. Private security guards protect nuclear power plants. Burns International, for example, employs over 3,000 guards for 25 nuclear facilities throughout the county. Further, our industry protects our nation's Strategic Petroleum Reserve sites on behalf of the Department of Energy. We also transport huge amounts of money and guard classified information, negotiable securities, and dangerous drugs, and protect hundreds of local utilities.

The nature of our business, Mr. Chairman, makes us a prime target for infiltration by criminals and terrorists. This is why pre-employment screening is so critical. Just as a post-employment polygraph is of no assistance in repairing the damage caused by a Soviet spy who has infiltrated an intelligence agency and given away critical secrets, post-employment polygraphs are of no assistance if a nuclear power plant has been sabotaged or a water supply poisoned by a terrorist who has infiltrated a private security company. Further, because such acts will be immediately detected, the perpetrator will in almost every instance have fled before he can be administered a polygraph test in the course of an investigation.

The threat of terrorism is not imaginary, Mr. Chairman. In 1983, a terrorist infiltrated Wells Fargo Armored Service in Connecticut-- a state which does not permit pre-employment polygraphs. He fled the country after stealing $7 million. There was no need for a lie detector after the fact. He was gone. According to the FBI the money was used to purchase explosives and weapons which were used in terrorists attacks in San Juan, Puerto Rico.

Similarly, the FBI and the police department in Dade County, Florida are investigating a Marielito gang operating in South Florida. This group which is suspected of the murder of a Wells Fargo employee on June 21, 1985, has plagued the armored industry in Dade County with at least seven attacks since 1982. Police have uncovered documents showing that the gang plans to have members seek employment in the armored car industry. Polygraphs to screen applicants are critical in keeping them out.

Mr. Chairman, clearly this is most important use of the polygraph in our industry-- screening out those who apply for sensitive job positions with criminal motives. Our company uses only qualified polygraph examiners with prior law enforcement experience. We regularly see those examiners accurately detect deception in answers to specific questions aimed at motivation and past criminal record.

Although the lie detector test is only one step in a process which includes interviews, verification of prior employment, and other checks, it is a critical step. In New York, for instance, all guards must be fingerprinted and complete an application which must then be approved and processed by the state. If this processing discloses a criminal arrest record, the state advises the employer to terminate the employee. Unfortunately, it takes more than four months to obtain state clearance. Meanwhile, we could have a convicted felon on our payroll, assigned to protect a customer's highly valued assets. The pre-employment polygraph is the key to alerting us to a problem. It affords us the opportunity to look more closely at the applicant before putting him on the payroll, if the test results indicate deception.

Mr. Chairman, we commend you for your concerns regarding the improper use of the polygraph. There is no question that a lie detector can be used abusively. I would like to emphasize, however, that we make every effort to be sure that abuses do not occur in the private protective security industry.

Individuals applying for jobs in our industry are well aware that they are applying for sensitive positions. They know there will be background investigations. They know there will be polygraphs. Yet, they knowingly and voluntarily apply for jobs which will require such scrutiny.

We believe we properly administer tests. At no time does applicant screening involve any question regarding religion, attitude toward unions, political beliefs, sexual behavior, or other personal issues. The polygraph simply is <u>not</u> an instrument of intimidation in our industry.

Mr. Chairman, as I understand it, this year's legislation again recognizes the need for the polygraph in the case of government employees. The intelligence agencies and police departments at all levels have found that properly administered polygraph tests are of great assistance in screening out those seeking employment with criminal intentions. We in the protective security industry have also found this tool to be important. We hope that you will recognize the sensitive nature of our mission and provide us with the same leeway as that given the public security sector in employing the polygraph.

I have attached a copy of the amendment that was agreed to last year to my testimony. I urge the subcommittee to adopt this provision. I sincerely believe it is critical to our ability to protect the public safety.

Mr. MARTINEZ. Thank you, Mr. Fanning.
Mr. Scheve.

STATEMENT OF WILLIAM J. SCHEVE, JR., PRESIDENT, AMERICAN POLYGRAPH ASSOCIATION

Mr. SCHEVE. Mr. Chairman, members of the committee, my name is Bill Scheve and I am President of the American Polygraph Association. I want to thank you on behalf of our organization for the opportunity to present our views on the legislation you are considering.

We understand this committee's interest in focusing public attention on the potential for abuse of the polygraph technique. We share this concern, but we take a different approach to solving the problem. We feel that the answer lies in establishing strict Federal standards for training and proficiency of polygraph examiners. The answer does not lie in banning the use of the polygraph technique in the private or any other sector.

The 99th Congress wisely supported increased polygraph testing of civilian and military personnel with access to highly classified information, but the need for polygraph testing to protect valuable information and assets does not end with the Government. The polygraph also is indispensable in protecting the customers, employees, inventories, and assets of American business and industry, and the private sector is entitled to use the polygraph.

The polygraph technique is acceptable in protecting national security and other Government interests, and it is also acceptable to protect the interests of business and industry. While we believe in the fundamental honesty of Americans, we also believe we must be realistic about protection against deceit. More than half the crime in this country goes unreported or is unsolved. Background checks cannot provide information on a thief, drug pusher, or rapist who has never been identified or caught.

A recent survey was conducted of more than 1,200 businesses that use polygraph examinations. Employers said that one of the main benefits of the polygraph is that it provided more information for an accurate assessment of an individual than background or reference checks alone. The Florida State Police administered polygraph examinations to 2,711 applicants between 1980 and 1985. Sixty percent of them were rejected because of confessions during the examinations about their involvement in criminal activities, and this is true of many other police agencies. Still, critics say that the polygraph should be outlawed in the private sector because it is occasionally fallible, yet medical tests also are fallible and malpractice suits abound because of the mistakes physicians make. No one claims the polygraph is infallible, but then few—if any—investigative or diagnostic tools are.

The Senate Commerce Committee, by a vote of 19 to 1, has endorsed mandatory drug testing for many employees in the transportation industry, yet no one claims that drug tests are infallible. But they do give employers information that they may be able to use to make decisions that protect the public safety and welfare. The polygraph serves the same function.

The suggestion has been made that Government examinations should be allowed because of the implication that Government examiners differ from examiners practicing in the private sector. That just isn't the case. I am one of many examiners who have worked for Federal and State law enforcement agencies, as well as for private business and industry. The skills and equipment I use are identical for all of my examinations.

Other critics of the polygraph have voiced concern about an alleged high rate of false positives, referring to individuals who are innocent but appear untruthful on a polygraph test. The Defense Intelligence Agency reports that, since 1981, it has tested 13,595 individuals, people in critical intelligence positions with access to secret, compartmentalized information. Of this number, only 17 were found to be deceptive, and the majority of them provided significant explanations for their deception. The concerns about false positives just do not materialize in actual practice.

We support the Young-Darden bill, H.R. 1536, because we believe it is the most workable polygraph legislation so far presented. Last year's debate on banning the polygraph in the private sector showed how complicated it would be to impose a private sector ban on polygraph use. Dozens of industries pleaded for an exemption from the ban, and amendments were adopted granting a number of them.

Granting selected exemptions sets up a pattern of arbitrary discrimination among American businesses. There simply are too many private sector industries with a legitimate and a compelling need to use the polygraph. The Congress itself relies on the use of polygraph examinations to protect this building and the members and staff who work here. The Capitol Police use the polygraph to screen their applicants and to investigate specific incidents, including suspected drug use. That the Congress itself relies on the polygraph is still another testament to its value.

The Young-Darden approach much better serves the interests of the American people and the needs of American business. It allows continued regulated use of polygraph testing in the private sector and in the public sector. We want to work with this committee to develop legislation that will ensure that the highest standards for polygraph examiners and polygraph testing are instituted and maintained nationwide. What is needed is a carefully developed body of polygraph law that sets a high standard for all polygraph examinations. We would hope that the Congress would find a way to address the needs of citizens to be protected from the potential for abuse. At the same time, we think the Congress should allow business and industry access to an investigative tool they have found useful.

Federal, State, and local governments, as well as American businesses, have demonstrated through their increasing use of and reliance on polygraph testing that the polygraph technique is needed. It is most often administered in a fair, equitable, and nondiscriminatory manner, and it works. Responsible legislation is required; prohibition is not.

Thank you.

[The prepared statement of William J. Scheve follows:]

PREPARED STATEMENT OF WILLIAM J. SCHEVE, JR., PRESIDENT, AMERICAN POLYGRAPH ASSOCIATION

My name is William J. Scheve, Jr., and I am president of the American Polygraph Association. I want to thank you on behalf of our organization for the opportunity to present our views on the legislation you are considering.

The APA is a non-profit technical, professional, and educational organization representing thousands of individual and corporate members. The legislation you are considering has special urgency for the thousands of employers we serve, for our members and for the polygraph industry.

We understand this committee's interest in focusing public attention on the potential for abuse of the polygraph technique. We share this concern, but we take a different approach to solving the problem. We feel that the answer lies in establishing strict standards for training and proficiency of polygraph examiners and for the accuracy and quality of polygraph examinations. The answer does not lie in banning the use of the polygraph technique in the private or any other sector.

The polygraph has unwittingly been called a "gimmick" and a "gadget" in these and other hearings. While we do not use that same terminology, we agree that the polygraph itself is only one of many diagnostic instruments. What is essential to the validity and reliability of a polygraph examination is that the examiner be highly trained and qualified in using the polygraph technique. It is not the polygraph itself that is potentially abusive but the few unskilled or unethical examiners who cause isolated instances of polygraph abuse.

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The American Polygraph Association believes that all polygraph examiners should be required to adhere to strict standards for training, education, and instrumentation. If the Congress were to extend these standards to cover all polygraph examiners, it would address the problem of potential polygraph abuse in a meaningful way.

In my testimony, I would like to address the value of the polygraph technique in both the public and private sectors. Then I will turn to the American Polygraph Association's recommendations for assurance of high quality polygraph examinations and protection of the rights of examinees. I also would like to address several issues which were raised during the March 5 hearings before this committee, specifically public attitudes about polygraph testing and accuracy.

Valuable in private and public sectors

For more than 50 years, the polygraph technique has demonstrated its value as an investigative tool. Our equipment and training have become more and more sophisticated over these decades. The accuracy rate has been demonstrated to be in the range of 90 percent when a competent examiner using properly calibrated equipment is able to reach a conclusion based upon chart analysis.

The polygraph technique is employed by many federal agencies and by state and local governments in investigations affecting public health, safety and national security. The increasing

prevalence of espionage and deceit in our government, such as the recent security breaches by Marine guards on embassy detail, underscore the need for polygraph examinations. Former Navy Secretary John Lehman said he favors random polygraph testing for embassy guards, both for their investigatory and deterrent value. And the 99th Congress wisely supported increased polygraph testing of civilian and military personnel with access to highly classified information.

Professor Thomas Magstadt is one of an increasing number of authorities saying that wider use of polygraph testing is justified for "individuals with access to secret information -- including those who handle it and those who guard it."

But the need for polygraph testing to protect valuable information and assets does not end with government employees. The polygraph is indispensable in protecting the customers, employees, inventories, and assets of American business and industry as well, and they also are entitled to access to the polygraph. If the polygraph technique is acceptable in protecting national security and other government interests, it should also be acceptable to protect the interests of business and industry.

During testimony before the Senate Labor and Human Resources Committee last year, noted attorney F. Lee Bailey said that as a defense lawyer, he would hate to live in a society where all polygraph examiners work for the government. He said that would be like having the news media controlled by the government.

Businesses now are required to conduct their own investigations of internal theft and other crimes to protect their assets and their customers. If the polygraph were banned in the private sector, more of the burden for conducting those investigations would be shifted to law enforcement agencies which already are overburdened with the caseloads they have.

Protection for employers and employees

Polygraph examinations have been shown to be one of the most valuable, effective, and credible investigative tools available to employers and employees alike. There are countless examples of polygraph examinations playing a key role in protecting innocent employees and customers, in reducing and in some cases even eliminating internal losses, and in helping to create a safe, secure workplace. It also helps clear innocent employees, thereby protecting their jobs and reputations.

This committee has built a reputation of showing great concern for the underprivileged in our society. The very name of this committee indicates that members have a strong interest in expanding employment opportunities for all Americans. We believe that the polygraph also serves a function in helping Americans get jobs who otherwise might be disqualified because they do not have strong personal or family ties in a community. If you remove the polygraph from the workplace, you give the advantage to people with roots in a community and who are well-known. In many cases, this could work against blacks and hispanics. Without the polygraph, jobs are more likely to go to those who

have consistent and stable work records and whose backgrounds can more readily be checked.

Consumers also benefit when businesses have access to the polygraph technique to identify employees who abuse their employer's trust and steal from the company. Employers are able to use the polygraph in investigations to ferret out these insider thefts, thereby helping to hold down prices.

In addition, many businesses find the polygraph valuable in helping them to guard the public interest. Day care centers must be able to investigate when child abuse is suspected. Nursing homes must be able to determine if their sick and often helpless patients are being mistreated. Banks, where 84 percent of losses are attributed to employees, must protect their customers' assets from inside schemes like computerized theft. Public utility companies, nuclear and chemical plants, airline companies and others have major public responsibilities and therefore need access to the investigatory tools that they and the government have found useful.

Drug protection

The Drug Enforcement Administration estimates that each year employees steal a million dosage units of controlled substances from pharmacies. In addition, the DEA says that millions more doses of non-controlled drugs are stolen every year, and these legitimate, but improperly used, drugs are among the most heavily abused. Nearly twice as many people are killed or injured from improper or illegal use of licit as opposed to illicit drugs.

There also is an economic price. According to the National Association of Chain Drug Stores, drug store prices have jumped as much as 15 percent because of employee theft.

The DEA endorses the polygraph because it knows that the drug industry needs the polygraph to help protect its inventories, thereby helping protect the health and even the lives of our citizens.

Most Americans approve of the polygraph

Regarding reported public opposition to polygraph testing, I would like to cite a recent study by Dr. Frank Horvath of the School of Criminal Justice at Michigan State University. A questionnaire was sent to examinees several weeks or months after they took polygraph examinations, and they were asked to respond anonymously. The study showed that 70 percent of those who had taken polygraph tests did not find them to be unfair, objectionable, or an invasion of their privacy. And about the same number said they would take the examination again if asked.

Of the 30 percent who objected to the exam, the vast majority of them did not meet the employers' standards for employment based upon other criteria.

The approval rates of Dr. Horvath's study mirror almost exactly the results of a recent public attitude poll taken in February of this year by Media General for the Associated Press. That poll showed that two-thirds of all Americans would not object to taking a polygraph examination. They also approved by wide margins polygraph testing for government employees in

sensitive posts and for court testing of suspects.

The American Polygraph Association believes that the majority of America's workers are honest. We believe that these polls reflect this honesty when they show that most people would willingly take a polygraph examination because they are honest.

But while we believe in the fundamental honesty of Americans, we also believe it is essential to be realistic about protection against deceit. About half of the crime that occurs in this country goes unreported or is unsolved. Background checks cannot provide negative information on a thief or drug pusher who never has been identified or caught.

Take police applicants, for example. Individuals applying for positions as police officers are well aware that they will be subject to very detailed screening checks before they are hired. Consequently, one would expect that police applicants would constitute an honest, law abiding group of individuals.

Yet in their book Truth and Deception: The Polygraph ('Lie Detector') Technique, Reid and Inbau reported that of 415 police applicants they tested, 234, or more than half were rejected because of confessions during polygraph examinations about their involvement in criminal activities, including felony thefts, burglaries, robberies, and the use and sale of illegal drugs.

Similar results were found by the Florida State Police where 60 percent of the 2,711 applicants tested between 1980 and 1985 were rejected, often because of serious admissions during polygraph examinations. Ohio and Maryland also report high

rejection rates.

What these figures show is that background and credit checks and interviews alone simply cannot produce a comprehensive picture of a person's qualifications for a particular job. Polygraph examinations, in conjunction with other investigative techniques such as background checks, are extremely valuable to employers in both the private and public sectors who need assurances they are hiring trustworthy employees.

In a recent survey of more than 1,200 businesses which use polygraph examinations, employers reported that one of the primary benefits of the polygraph is that it provided more information for an accurate assessment of the individual than background or reference checks alone. There is no better source of information about an individual than that individual. Since the polygraph helps in determining whether or not the individual has been truthful about his or her own activities, it simply stands to reason that more will be discovered than would be the case by relying on outside information alone.

The number of polygraph exams

Concerning the number of polygraph tests given, we have heard many times that two million polygraph tests are conducted each year in the private sector. That number has been attributed to the American Polygraph Association yet we have been unable to find any records in our organization to substantiate that figure. It is impossible for anyone to know how many tests are conducted because there is no central registry for licensing of all

polygraph examiners or for the numbers of tests they conduct.

But even if the number were in that range, it would seem to validate the need for polygraph testing. Employers who are concerned about protecting their employees and property are using a method they find effective.

Examinations provide useful information

Critics say the polygraph should be outlawed in the private sector because it is occasionally fallible. Yet medical tests also are fallible and malpractice suits abound because of the mistakes physicians make. The opinions of psychologists and psychiatrists can be unreliable and sometimes have extreme consequences.

In making a medical diagnosis, there are three elements in the decision making process: the patient's history (such as prior illnesses, treatments, and current symptoms), a clinical assessment (such as the physician's examination of the patient), and laboratory tests. All of these factors must be weighed in reaching a diagnosis, and the final decision does not rely on the laboratory tests alone. Patients expect their physicians to use the test results along with other information to make the best decisions they can. That is exactly what the American Polygraph Association advocates regarding polygraph testing. We do not believe that any decisions should be made about an employee solely on the basis of polygraph results.

No one claims the polygraph is infallible, but then few, if any, investigative or diagnostic tools are. The Senate Commerce

Committee by a vote of 19-1 has endorsed mandatory drug testing for many employees in the transportation industry even though no one claims that drug test are infallible. But they do give employers information that they may be able to use to make decisions that protect the public safety and welfare. The polygraph serves the same function.

Concern over inaccuracy

Some critics of the polygraph have voiced concern about "false positives," referring to individuals who are innocent but appear deceptive on a polygraph test. These critics have said that even with a 95 percent accuracy rate, five percent of those examined will show up as errors, some of them as false positive.

Yet in actuality, the Department of Defense reported that it tested 3,993 persons for security breaches in 1985 and 1986 and found only 13 to be deceptive, eight of whom made admissions during the test of improper disclosures of information.

The Defense Intelligence Agency reports that since 1981 it has tested 13,595 individuals in critical intelligence positions and/or who had access to secret compartmentalized information. Of this number, only 17 were found to be deceptive and the majority of them provided significant explanations for their deception.

These studies show that large numbers of false positives simply do not materialize in real life.

Polygraph is increasingly accurate

Advances in equipment and methodology have made the

polygraph increasingly accurate, and consequently both the private and public sectors are relying on it more as a tool in their investigations.

The American Polygraph Association has been a leader in initiating these advances. The APA has strict standards for ethical practice and for the professional backgrounds of examiners, and we promote continuing education for members.

The APA demands the highest standards for polygraph examiners and the equipment they use. We know that only through these standards can we assure the greatest accuracy in our tests. It is a fundamental premise that polygraph test results are only as good as the polygraph examiner. We have developed these strict standards for ourselves over the years because we know that the integrity of our profession depends upon the integrity of individual examiners.

The APA's Code of Ethics and Standards and Principles of Practice demand high moral, ethical, and professional conduct. We consider our primary responsibility to be to the person who is taking the examination. We are required to discharge our duties with complete impartiality, dignity, and respect. We are forbidden from allowing considerations of race, religion, politics, union activity, or economic status to play any part in our examinations. We are pledged to issue an objective and unbiased report and to protect the confidentiality of the examination results.

The APA School Accreditation Committee examines the

curricula and instructional staffs of polygraph schools. It also inspects their physical facilities and equipment at periodic and unannounced intervals to ensure APA standards are being met.

Government and private sector examiners

The suggestion has been made that government examinations should be allowed because of the implication that government examiners differ from examiners practicing in the private sector. That just isn't the case. I am representative of a large number of former federal and state polygraph examiners who now work in the private sector. My qualifications are no different today than when I was conducting examinations for federal and state governments. I use the same kind of equipment, the same techniques, and my standards are identical.

The APA maintains and enforces these high standards for our many members, yet we recognize that a number of practitioners who are not affiliated with organizations such as ours may choose not to follow a competent examiner's standards of practice. We also recognize that in the polygraph profession the potential for abuse exists, as it exists with any profession or by any professional utilizing a diagnostic tool. That is why the American Polygraph Association would welcome action by the Congress to ensure that all examiners follow strict standards. We believe the legislation being offered by Congressmen Bill Young of Florida and Buddy Darden of Georgia would meet this test.

They are proposing a carefully considered body of polygraph regulations. Their bill provides important protection for the

rights of examinees. Examiners would be barred from asking personal questions such as religious, racial, political, or labor union beliefs or affiliations. The bill would require all questions to be presented to the examinee in writing before the polygraph examination begins, and any waiver of these rights would be prohibited. Additionally, it would assure the examinee that the results would be kept confidential.

Most important, no decisions about hiring or firing an employee could be made solely on the basis of a polygraph examiner's opinion.

Further, it would encourage the states to develop their own legislation by adopting the federal standards and adding their own provisions adapted to the particular needs of their citizenry.

Most states already have laws regulating the use of the polygraph, and Kansas and Missouri currently are considering polygraph legislation. The states have proven that they are willing to take on the issue of the polygraph to develop legislation that is appropriate for their citizenry.

Total ban wouldn't work

We support the Young-Darden bill (H.R. 1536) because we believe it is the most workable polygraph legislation so far presented. Last year's debate on banning the polygraph in the private sector showed how complicated it would be to impose a private sector ban on polygraph use. Dozens of industries pleaded for exemption from the ban and amendments were adopted

granting exemptions to government contractors with defense or national security responsibilities, companies that employ persons who have direct access to controlled substances, power plant operators, public water supply facilities and other utilities, security and armored car companies, and nursing homes and day care centers. The list of industries with solid grounds for exemption could have grown much longer, but the House called a halt to the exemptions.

Granting selected industries exemptions sets up a pattern of arbitrary discrimination among American businesses. There simply are too many private sector industries with a legitimate and convincing need to use the polygraph.

Business needs protection, too

A number of state courts have held companies liable in matters where customers or other employees were injured or robbed by other employees who were not properly screened. Hotels and motels also have been held liable when employees who had access to room keys committed robbery or assaulted guests. Employers must make sure that the people they are hiring are honest and reliable.

Competent polygraph examiners recognize and respect an individual's right to privacy. But we also know that one of the prices we pay for living in a complex society is that we give up some of our privacy for the benefit of society as a whole. We allow ourselves and our luggage to be searched whenever we travel on an airplane. Companies can ask prospective employees to take

physical examinations and drug tests and to allow investigations of their work histories and personal associations.

We recognize that the right to privacy must be balanced with other rights as well. A company has the right to protect itself against individuals who might take actions that destroy a company or its reputation or that cause harm to customers or other employees.

Seeking the best solution

With public attention focused on truth telling, both in the private and public sectors, we encourage the Congress to carefully study the best way to ensure integrity in the workplace. The bill introduced by Mr. Williams would unfairly outlaw an investigative tool which has demonstrated its validity and utility. We believe that in allowing continued, regulated use of polygraph testing the Young-Darden approach much better serves the interests of the American people and the needs of American business. We ask that the polygraph not be banned. We are helping American business and industry do what it must to protect themselves and the public.

We want to work with this committee to develop legislation that will ensure that the highest standards for polygraph examiners and polygraph testing are instituted and maintained nationwide. What is needed is a carefully developed body of polygraph law that sets a high standard for all polygraph examinations. We would hope that the Congress would find a way to balance the needs of citizens to be protected from the

potential for abuse at the same time it allows business and industry access to an investigative tool they have found useful.

Federal, state and local governments, as well as American businesses have demonstrated through their increasing use of and reliance on polygraph testing that the polygraph technique is needed, that it is most often administered in a fair, equitable, and non-discriminatory manner, and that it works. Responsible legislation is required. Prohibition is not.

Mr. MARTINEZ. Thank you, Mr. Scheve.

Your testimony dealt with the qualifications of polygraph examiners, and you even spoke to the need for standards across the country. I have to agree with you. I think there has got to be more than what it takes now to qualify a person to be a polygrapher. In my own experience—and I guess we can't judge the whole situation by one's own limited experience, but I have seen in my own area people becoming polygraph testers who I think are less than qualified. They don't have the background, the necessary education in certain areas, such as psychology, and they become polygraphers. As a result, I've actually seen situations where one polygrapher has tested an individual and found him unqualified, based more on his own biases than on what that machine said. That person can be tested by another examiner, and that examiner come up with completely different results, which somehow leads me to believe that a lot of it is dependent on an individual's own biases, his own prejudices and his own reasoning as far as determining what the indication on the machine leads him to believe.

I don't know, and maybe you can tell me, exactly what kind of standards should we have as far as education and as far as testing out a person's qualifications to be licensed on a national basis as a polygrapher.

Mr. SCHEVE. I think that Federal standards could be applied to require States to maintain these as minimum standards. I think the standards could be educational in terms of appropriate background. I don't think anybody really needs a degree in psychology, but they do need a degree in something. They should be exposed to psychology. Psychology is part of the instruction that is taught during a polygraph course. It varies anywhere from 40 to 80 hours, which is equivalent to two courses. There are also a number of hours required in physiology. You don't need to be a physician, but you need a basic knowledge of the central nervous system. There's no question about this and how it applies and how it is measured by a polygraph instrument.

You certainly need adequate training and an internship period after the training. This is applied in many States, including in California where they have an internship program under the licensing law that was enacted in California three years ago, where I also worked as an examiner for the California Department of Justice for eight years.

There are a number of highly qualified people in California. I am familiar with most of them. That you had the misfortune to run into one that wasn't, I think, is the exception and certainly not the rule in California.

Mr. MARTINEZ. It wasn't just one, though. There were several.

Mr. SCHEVE. One or several.

Mr. MARTINEZ. We had problems, particularly with the police departments.

Mr. SCHEVE. That, I can understand. They send them to school for seven weeks, and then they don't have any supervision after that period of time. There are many small police departments that do this, and I was partially involved in getting them some additional training because you are not qualified to run polygraph tests after seven weeks of schooling alone.

Mr. MARTINEZ. Well, you see, that's part of my reason for questioning the credibility of the use of polygraphs in every instance. The training I saw in the departments of the cities that I represent was very inadequate as far as I'm concerned. And the people that went to those schools, that the Department chose to go to those schools, I don't believe had the background to begin with.

Mr. SCHEVE. In many cases, you're right.

Mr. MARTINEZ. Mr. Gunderson?

Mr. GUNDERSON. Thank you, Mr. Chairman.

Either one of you can answer this for me. Can you share with us the typical occupations for which you test today, and can you make estimates of what percentage of people, applicants in that occupation, are tested? In other words, who do you test? Who don't you test? And if you test people in home security industries, how many people do you project in the home security industry use the preemployment polygraph? Twenty percent? Fifty percent? Eighty percent? Any idea?

Mr. FANNING. I would say that the percentage there, Mr. Congressman, is somewhere around 30 percent. For instance, in our industry we test our armored truck personnel plus some of our alarm people, and we test some of our guards. Not all of them. And we only test those where we believe that the requirement is there and the test is necessary for public safety or for nuclear plants, Strategic Petroleum Reserve personnel, people like that. So I don't think—as I can answer for my industry, we certainly don't test even 50 percent, much less than 50 percent of our personnel.

Mr. GUNDERSON. When do you test the personnel that you do test?

Mr. FANNING. Usually when we hire them, sir.

Mr. GUNDERSON. How about if you hire someone for a nontested area and you switch them into what you consider a high risk area?

Mr. FANNING. Then we test them prior to their going to the new client or the new area.

Mr. GUNDERSON. You test them even if they have a good work record with you?

Mr. FANNING. Yes, we do. In a lot of cases, Congressman, it's required by a contractual thing. For instance, the Nuclear Regulatory Commission makes it necessary for us to test the guard who is going into the nuclear plant. The same with the Strategic Petroleum Reserve and other similar governmental activities.

Mr. GUNDERSON. Mr. Scheve, can you give me some idea—you're from a polygraph association—of the typical occupations and professions which you test?

Mr. SCHEVE. Not me personally, but people in my organization. They test people who work in retail stores. They test people who work for power plants. Almost any industry is susceptible to problems, either safety problems because of drug or alcohol abuse, or theft problems. Almost everybody would be susceptible to this kind of testing.

Mr. GUNDERSON. That's a pretty general answer. That doesn't help us much when we get into the area of trying to determine which exemptions, if any, should be provided.

Mr. SCHEVE. Oh, in terms of exemptions?

Mr. GUNDERSON. Can you be more specific?

Mr. SCHEVE. Well, in terms of exemptions I would certainly be concerned about industries where there is a high possibility of computer theft that costs us millions of dollars; banks; banking industry; people who have access to large sums of money; who are involved in moving large sums of money; proprietary secrets that could cause the failure of a business if it was released outside the business; people who are working in health care facilities where patients are unable to take care of themselves. I have certainly been involved in a number of investigations in that area. Certainly, law enforcement agencies where somebody is going to be entitled to carry a gun and make critical decisions that could be life-threatening at any given time. There are any number of industries in which I think it's appropriate.

Mr. GUNDERSON. It sounds like you want them all exempted.

Mr. SCHEVE. I think every business has the right to protect itself, yes, sir.

Mr. GUNDERSON. Describe for me the inconsistency in the length of test that various people administer. Is there any indication that the longer the test is, the more accurate the results are?

Mr. SCHEVE. Within reason, yes. I think a minimum amount of time of an hour should be allotted for pre-employment of somebody who is just getting out of school or has only been in the workforce for a year or two. It could run longer. There should not be any set amount of time; you should take whatever time is necessary. When I hear about these 10 or 15 minute examinations, which I've heard about, people running 30 or 40 tests a day, it makes me want to retch because that is not polygraph. Under no circumstances should eight or ten polygraph examinations be conducted in any given day, and that is only for simple-type examinations. More complex examinations may take anywhere from two to four or five hours. You do as a polygraph examiner what you are required to do in order to resolve whatever the issues might be.

Mr. MARTINEZ. Will the gentleman yield?

Mr. GUNDERSON. Sure.

Mr. MARTINEZ. On that same line of questioning, in testimony after testimony we've heard where a person tested negative to begin with. But after a period of time, as the tests went on, and the longer they took and with the tester leaving the room and conferring with other people and then coming back, eventually the examinee started to break down because of the long time. You know since, both of you were in law enforcement, that the one thing about trying to get information from a suspect, you go for long hours at a time. In the beginning, when resistance is high because of freshness, the person may not concede anything at all; but the longer they go and the more weary they become, the more susceptible they are to breaking down. It would seem like the same thing happens when you're testing a person's reflexes, whether it's the respiration or the heartbeat or the pulse rate or whatever. You know, it really becomes that. And in testimony we've received from people who have felt that they were wronged indicated that it was after several conferences outside the room and a long period of time that the person broke down and tested differently than they originally tested.

Can you answer me, how do you counter that?

Mr. SCHEVE. If it's the issue that was testified to at the last hearing, I am not at liberty to discuss it because it's confidential, but it is not the way that it was presented to you.

Mr. MARTINEZ. Well, it was more than just the last hearing. We've heard it from several witnesses at different times. I would think that, being realistic, most people do get tired and most people do break down under the stress and strain of being questioned in this way, under this kind of condition. There's got to be a time limit in which they can endure, and they may just say anything just to get the thing over with.

Mr. SCHEVE. You are now talking a specific issue examination as opposed to a pre-employment examination.

Mr. MARTINEZ. Yes. But you indicated that examinations could go on for hours.

Mr. SCHEVE. In a specific issue criminal testing situation.

Mr. MARTINEZ. Specific issue? Well, on the pre-employment hiring, is there a specific time?

Mr. SCHEVE. I think an average time would be about an hour and often less than that, depending on the person's age and their background experience. And you're limited in the issues that you would discuss. All you're concerned with is drug abuse and theft potential. You've got no business getting into the person's sex life or political beliefs or union beliefs or any of these things.

Mr. MARTINEZ. Mr. Hayes.

Mr. HAYES. Thank you, Mr. Chairman. Given the testimony of these two gentlemen, clearly, I think, it explains their position. It isn't hard to understand that they are opposed to H.R. 1212, and I'm for it as one of the cosponsors. So we start off on a different course.

I just want to ask one specific question. Do you think—and I'm all for preservation of Constitutional rights—do you think we might solve the Iranscam situation by giving lie detector tests to all the people, starting at the top, and working all the way down?

Mr. SCHEVE. I think there's an excellent probability that you might, yes. [Laughter.]

Mr. HAYES. Would you recommend it?

Mr. SCHEVE. Again, I would remind the Congressman that under any given circumstance, the polygraph is voluntary. And when we talk about someone sitting in a polygraph room undergoing interrogation for four or five hours, he knows he can get up and walk out any time he wants to. So I think that's an essential thing you need to remember.

Mr. HAYES. How long do you think it would be voluntary if we had such a law that did just exactly what you want. That is what you have suggested, for Federal employees?

Mr. SCHEVE. I'm afraid I don't understand you, Congressman.

Mr. HAYES. How long do you think polygraph tests would be voluntary for Federal employees if we would had a law that required people—that gave you the right as an employer, and we as the Federal Government as employers, to test people at random?

Mr. SCHEVE. I don't think you can provide such a law. But again, polygraph presumes voluntariness on the part of the person taking the examination. You, as his supervisor, may require him to do it,

but I, as a polygraph examiner, will not conduct an examination on him against his will.

Mr. HAYES. Thank you, Mr. Chairman.

Mr. MARTINEZ. Thank you, Mr. Hayes.

Mr. Henry.

Mr. HENRY. Thank you, Mr. Chairman. I would just like to ask the Chair or anyone on the committee a question, which I still have from last year.

I had asked the question—to the private sector, the polygraph associations, professional associations, the insurers, retailers, wholesalers—if they could come up with any evidence or data indicating that those States which have prohibited or restricted the use of polygraphs, as opposed to those States that have not, have in fact experienced adverse loss ratios, increased insurance premiums, or any other statistical data which would justify the claims of economic loss. And I'm wondering whether the Chair has received anything of that nature.

Mr. MARTINEZ. No, Mr. Henry, we have not. We have asked for it continually. We have asked for it from the proponents of the polygraph and we've asked for it from the opponents of the polygraph. We have not received any, sir.

Mr. SCHEVE. Did not Days Inn provide you with a report on the reduction in their losses as a result of instituting polygraph programs?

Mr. MARTINEZ. I think what Mr. Henry was asking for was not a specific instance or situation or place, but generally across the country where they do allow and don't allow polygraphs for the purpose of comparison.

Mr. SCHEVE. Okay. Didn't Mr. Zale say that he would deliver last year, showing in States where he could not polygraph test that his losses were four times greater than what they were in States where he could?

Mr. MARTINEZ. He did say that, but he did not provide it.

Mr. SCHEVE. He did not?

Mr. HENRY. I specifically had asked for that type of information. That's why I wanted to make very clear that we have asked for that for several years, and I have also directly asked for it from some of the insurance industry. We have not received that; I wanted that to be very clear on the record.

Mr. MARTINEZ. This may be fair or unfair for me to say, but I have to say it. In an instance where one person said they could provide it and did not provide it, it leads me to believe that when they did take the time to research the issue they found that there wasn't a significant difference or that it would not hold their argument up, and therefore they did not provide it. I know that if I had information to prove what I've stated, I would provide it right now.

Mr. Henry?

Mr. HENRY. That's all, Mr. Chairman.

Mr. MARTINEZ. Mr. Owens?

Mr. OWENS. No questions, Mr. Chairman.

Mr. MARTINEZ. Mr. Grandy?

Mr. GRANDY. Thank you, Mr. Chairman.

I would like to discuss with you gentlemen the difference in the application of the test, pre-employment versus post-employment.

Do you have any data, or perhaps the Chair does, on the efficacy of these examinations conducted for pre-employment reasons—in other words, to screen anybody who is applying for a job the first time—or post-employment conducted when there is a specific allegation? Perhaps a crime has been committed, or perhaps you're conducting the test because somebody wants to move to a more sensitive type of position. Do you have any data indicating how the test works in different situations? Because I sense that what we're trying to do here is find out where this test works, if at all, as a management tool and how to allow for the use of that. Is there any data extant right now that differentiates between pre-employment and post-employment?

Mr. SCHEVE. I don't know how much data there would be on post-employment. Certainly, when we talk about post-employment, you're really talking about two different kinds of tests. You're talking about a specific testing situation where a specific incident—a theft, or something like this—has occurred, and you have four or five people who might be suspects.

Mr. GRANDY. It's my understanding that the more specific the circumstances surrounding the test, the more accurate the result.

Mr. SCHEVE. That's true.

Mr. GRANDY. My problem with the pre-employment test is that it allows for inaccuracy. As a matter of fact, I have a member of my staff who, when he first got out of college, applied for a position at a convenience store, failed the polygraph test twice and was still hired. So I wonder if the employers themselves have deep confidence in these exams.

But to use it specifically, if there has been a charge, if there has been an allegation, if there is a need to offer some kind of security clearance, that's what I would like to know, how the test works in that situation and if there is a way to really hone in on how this could work as a management tool.

Either one of you. I'm not addressing this only to you, Mr. Scheve.

Mr. FANNING. I just don't have the statistics on that.

Mr. GRANDY. Well, it seems to me that this committee needs that. It needs that to allow you what you want to do, and this is one of the themes that recurs in these deliberations, that perhaps the technology is not there to write effective law, using the polygraph as a management tool. That's my concern, and that's what I keep coming back to.

Let me follow up now. What tests, besides the polygraph, are out there to monitor an employer's confidence in an employee? What do you have besides the lie detector?

Mr. SCHEVE. The most common device used other than the polygraph is a paper and pencil psychological test for attitudes about honesty and theft, things like this. There are a number of tests. There's the London House, there's the Reed Report, the Phase II, the Wilkerson Test. There are probably at least a dozen or more of these tests.

Mr. GRANDY. Can you comment on how they stack up in comparison to the polygraph in terms of accuracy?

Mr. SCHEVE. I don't think they would be anywhere near as accurate as the polygraph, although most of them have published stud-

ies showing that the tests are valid. And usually, when they measure these tests, they measure them against the standard of the polygraph.

Mr. GRANDY. Having said that—the reason I bring it up is that we will be considering paper and pencil tests when we markup H.R. 1212. Are you inferring that if we don't say yes to polygraph, we should not say yes to paper and pencil tests too as a management tool? Do you need the entire package, or is——

Mr. SCHEVE. Actually, in my own company, we use both.

Mr. GRANDY. Do you need the combination of both?

Mr. SCHEVE. Yes.

Mr. GRANDY. Are you saying that polygraph is the top of the line when it comes to accuracy?

Mr. SCHEVE. Yes, because you actually are talking to the individual at that time and you can be more specific in your questions and tailor your questions to that individual.

Mr. GRANDY. And do paper and pencil tests return a greater accuracy when the test is more specific? In other words, how do preemployment and post-employment tests differ?

Mr. SCHEVE. There are no post-employment tests as far as paper and pencil tests are concerned.

Mr. GRANDY. Strictly used a priori?

Mr. SCHEVE. As a screening device for hiring, yes.

Mr. GRANDY. Okay.

Mr. FANNING. I'd like to make a comment, Congressman.

Mr. GRANDY. Sure.

Mr. FANNING. We are using both of them at the present time. We're using the polygraph and the London House.

Mr. GRANDY. I'm sorry, I'm not familiar with London House.

Mr. FANNING. Well, it's one of the leading companies that puts out the paper and pencil test, along with Minnesota and a few others.

We have found a similar coordination between both. We haven't found that the polygraph and the paper and pencil test are that different. We're getting similar results. I think one of the problems we're having is that in the paper and pencil test, there are several grades, and I think that there you have to use the person's educational background, his reading skills. And once that's ironed out, which we are doing right now on an experimental basis, it's coming out very well.

Mr. GRANDY. Let me just ask one final question, then. Perhaps you can comment, Mr. Scheve.

What is the progress of technology in polygraph? Has it become a more effective piece of technology? Is it being refined? Is it being developed? Are we looking at a system that's getting better?

Mr. SCHEVE. Absolutely.

Mr. GRANDY. We are?

Mr. SCHEVE. Yes, sir.

Mr. GRANDY. What was the polygraph accuracy like 10 years ago? Can you comment?

Mr. SCHEVE. Probably right around the range of 90 percent, and I think with a competent examiner right now it's probably up around 95 to 98 percent, and this is based on two developments,

primarily on changes in test question construction techniques, more information about anti-polygraph countermeasures——

Mr. GRANDY. Excuse me. Let me just interrupt you. You said 95 percent accuracy rate now. Would you apply that to pre-employment testing?

Mr. SCHEVE. No, sir, I would not.

Mr. GRANDY. I see. Could you give me a figure for pre-employment testing?

Mr. SCHEVE. Depending on the examiner, I would say that pre-employment testing is anywhere from 85 to 90, 95 percent. If he takes the time to do it right, it can be extremely accurate. If he does it in 15 minutes, I don't have any confidence in those test results at all.

Mr. GRANDY. Do you foresee, 10 years down the line, the polygraph being 5 to 10 percent more effective than it is right now? I mean, are there technological breakthroughs?

Mr. SCHEVE. I don't see any significant technological breakthroughs on the horizon other than further refining the techniques of the user in administering a polygraph examination.

Mr. GRANDY. And in that, are you saying that perhaps we have to refine the technician that applies the test?

Mr. SCHEVE. Yes.

Mr. GRANDY. I see.

Mr. SCHEVE. Absolutely right.

Mr. GRANDY. Thank you, gentlemen.

Mr. Chairman, I will yield back.

Mr. MARTINEZ. Thank you, Mr. Grandy.

I would be remiss if I did not advise you that in testimony that we've had before, the percentages of accuracy are quite different than what we've been presented here, and that the refinement of the tool itself has been only in the actual devices, not the system itself, that it's pretty much the same as it originally started. That's the counterside of the testimony.

Mr. GRANDY. Well, I'm aware of that. I thank the Chair for advising me of that. But it seems that if there's one thing that's consistent in these deliberations, it is that we can't arrive at a figure that indicates how successful or unsuccessful this test is.

Mr. MARTINEZ. Mr. Jontz?

Mr. JONTZ. Thank you, Mr. Chairman. I have a relatively short question.

At our previous hearing we heard testimony from the American Psychological Association, among other groups, and their statement said, "There is no evidence that any physiological response pattern is associated uniquely with deception." Let me say that again. "There is no evidence that any physiological response pattern is associated uniquely with deception."

Do you agree with that?

Mr. SCHEVE. Technically, yes. Empirically and otherwise, no. I could very readily show you, in a properly conducted polygraph examination, response patterns on the charts that are indicative of stress. And under the structured circumstances they will almost always be indicative of deception.

Mr. JONTZ. You would say that they are uniquely associated with deception? That is to say, they can be associated with deception and nothing else?

Mr. SCHEVE. I already said "almost always," so therefore I cannot say "uniquely" every time. That's why it takes a skilled examiner to evaluate other things that are going on at the time, and not just the charts. Certainly, if I have any reservations about what I see in the charts, I'm going to do more to find out what the real problem is.

Mr. JONTZ. Thank you.

Mr. MARTINEZ. Thank you, Mr. Jontz.

That's the problem. If we take the bottom end of the percentages of accuracy, 65 percent, then 35 people would be wrongly accused. Six people wrongly accused even at 94 percent. And those six people wrongly accused—if a test is not more accurate than that, I'm just wondering if we can justify the use of it to wrongly accuse even six people?

So that's the problem that many of us have with just saying carte blanche use of the polygraph is something that we should allow.

I want to thank both of you for appearing before us this morning and giving us your testimony. It was very important and very helpful. Thank you.

I have been furnished a prepared statement from Congressman Pat Williams, which will be included in the record at this point.

[The prepared statement of Hon. Pat Williams follows:]

PREPARED STATEMENT OF HON. PAT WILLIAMS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MONTANA

In beginning today's hearing, I wish to remind my colleagues of the statements provided by the American Medical Association, the American Psychological Association and the National Institute of Justice study.

"The AMA does not support the use of polygraph for employment purposes in private industry * * * because the polygraph testing and scoring methods currently used in personnel screening have not been shown to be valid tests of truthfulness with a high level of predictability. * * * The criminal justice system has long refused to recognize the validity of polygraph testing. Since the landmark decision of *Frye* v. *United States* in 1923, polygraph test resuits have not been admissible as evidence to prove guilt or innocence in a criminal trial."

The APA states, "There is no data for the validity of polygraph tests in employment screening. * * * Other than anecdotal data, we have no basis to assume such tests to be valid. None of the fundamental test validity criteria are met by such applications of psychophysiological measurement techniques. Furthermore, there is no evidence that any physiological response pattern is associated uniquely with deception."

The National Institute of Justice study on employee theft conclude that using polygraphs does not in fact appear to reduce employee theft. The study concluded:

"Assessing previous theft activity outside of the work setting (by using polygraph exams) has little relevance to future workplace behavior. However, checking on one's previous pattern of employment history and dedication to a former employer are probably much better indicators. * * * More importantly to companies interested in reducing theft and counterproductive behavior is sensitivity to the preceptions and attitudes of the workplace. In short, we found those employees who felt their employers were genuinely concerned with the workers' best interests reported the least theft."

Mr. MARTINEZ. And with that, the hearing portion of this meeting is adjourned and we will move to the markup.

[Whereupon, at 9:48 a.m., the subcommittee proceeded to other business.]

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APPENDIX

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STATEMENT OF

JUDY GOLDBERG

LEGISLATIVE REPRESENTATIVE

AMERICAN CIVIL LIBERTIES UNION

before the

SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES

OF THE

COMMITTEE ON EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

in support of

HR. 1212

THE EMPLOYEE POLYGRAPH PROTECTION ACT

March 5, 1987

(159)

Mr Chairman and members of the committee:

Introduction

On behalf of the American Civil Liberties Union, I want to thank you for the opportunity to add our views to the permanent record of this hearing on the Employee Polygraph Protection Act. The American Civil Liberties Union is a non-partisan organization of over 275,000 members dedicated to the defense and enhancement of civil liberties.

I testify today in strong support of HR. 1212, the Employee Polygraph Protection Act, which is designed to prohibit employers engaged in interstate commerce from requesting or requiring that their employees or job applicants take polygraph examinations. If passed by Congress it would protect the individual rights of millions of citizens and strike a blow for basic fairness in the workplace.

The American Civil Liberties Union opposes the use of lie detection devices as an invasion of privacy, an affront to human dignity, a violation of self incrimination prohibitions, and an unlawful search and seizure, whether or not at some future time such devices may be found to have scientific credibility.

This Act provides critically-needed federal restrictions on private employers whose use of so-called "lie detectors" has tripled over the past decade to a level of some 2 million tests per year. The restrictions, along with provisions to enforce them and remedies for their violation, can protect the tens of thousands of persons who every year are unfairly denied or dismissed from employment in the private sector as a direct result of submitting or refusing to submit to what one expert has aptly called the "bloodless third-degree."

Scientific Unreliability

The polygraph test basically depends upon simple mechanical recordings of the fluctuations in an individual's rate of respiration, blood pressure and skin perspiration during a prescribed plan of interrogation. Polygraph advocates claim these recordings can be interpreted by "trained" examiners to provide conclusive evidence of the truth or falsity of the individual's "yes" or "no" answers to particular questions.

In fact, since there is no known physiological response that is uniquely identified with the act of deliberate deception, the polygraph technique is simply invalid. The so-called "lie detector" is really only a "stress detector" and a polygraph examiner has no scientific basis for distinguishing the stress that may indicate deception from any other stress, including fear, anger, humiliation or frustration regarding the polygraph test itself.

In 1983, the Office of Technology Assessment, the research

arm of the U.S. Congress, released its comprehensive study Scientific Validity of Polygraph Testing. The study concluded that: "available research evidence does not establish the scientific validity of the polygraph test for personnel security screening", and that "the further one gets away from the conditions of a criminal investigation, the weaker the evidence for polygraph validity". The report went on to express concerns about persons falsely labeled as deceptive by these tests.

The American Psychological Association recently has adopted a policy resolution recognizing that scientific evidence for polygraph test validity is "still unsatisfactory". This year the American Medical Association and the American Psychological Association have both testified in support of HR. 1212 due to the tests' unreliability.

One of the foremost researchers on the validity of polygraph examinations, Dr. David Raskin, testified in April 1986 that "there is not a single scientific study which demonstrates any reasonable degree of accuracy for general employment (polygraph) screening tests". He went on to add that the degree of reliability of the polygraph as a detection device falls below 50% whenever the number of guilty people in a group to be tested is less that 20%, even when it is used to investigate specific incidents.

Even F. Lee Bailey, testifying in favor of polygraph use has stated that his support was confined to polygraph use in specific investigations, conducted by a skilled and highly trained examiner, and when the examination lasted a minimum of three hours. All his claims for accuracy were predicated on its use under those conditions. He also indicated that he did not believe the test was a reliable tool for employee screening. Brief employment screening tests, commonly used as a condition of employment, did not meet his definition of a polygraph test.

Testimony indicated that such tests brand an estimated 300,000 U.S. workers as deceptive each year, causing them to be fired, disciplined, or not hired.

The Issue of "Consent"

Some have argued that employer use of polygraph tests is not invasive because an employee is often required to sign a waiver stating that he or she consents to take the test voluntarily. This reasoning is self deceptive. In many cases employees are told, or are aware, that their only options are to take the test or to lose their job. Given this choice, is it surprising that many chose to take the test in spite of strong objections? Their consent in these cases is clearly coerced.

The Tests Have a Discriminatory Impact

The subcommittee heard testimony that there is mounting evidence that polygraph tests have a substantial discriminatory

impact on black job applicants and employees. In the Illinois case of Moon v. Cook County Police and Corrections Merit Board the judge found that the statistics:

> "demonstrate that a higher percentage of blacks failed the polygraph test than whites taking the same test. In fact, plaintiff's expert witness correctly determined ... that there was one chance in 1,000 that ... the proportion of blacks who failed the polygraph test would be as great as 72.5% (where 67.5% of those taking the test were black) if blacks had an equal chance of passing the test."

Obviously, a test which measures blood pressure, breathing and heartbeat can discriminate severely against persons with physical ailments or handicaps. In the case of Mark Smith v. Mechanics Lumber Company et al., an Arkansas man with multiple sclerosis was required to take several polygraph examinations. Not surprisingly, given the nature of his illness, he was told that he had failed the exam. The lawsuit alleges that the stress of the exams, and being told that he had failed the exams, brought on an aggravation of the MS, at one point making him partially paralyzed.

State Laws Vary Widely

The Employee Polygraph Protection Act would extend relief from the dubious "lie detector" to millions of prospective and current members of the private workforce who are not now covered or adequately protected under the patchwork quilt of diverse polygraph legislation that has been enacted over the years by forty-one states and the District of Columbia.

Only nine states currently have no laws governing any aspect of employee polygraph testing. Nineteen states either require licensing of polygraph examiners or regulate the conduct of polygraph examinations. Ten states[1] prohibit most private employers from requiring a polygraph examination as a condition of employment or continued employment, but allow an employer to request such an exam. Finally, twelve states[2] and the District of Columbia prohibit most private employers from requiring or requesting that a polygraph test be taken as a condition of employment, effectively banning its use in employment.

Some employers evade state laws which prohibit requiring polygraph testing for current or prospective employees by pressuring these individuals into "volunteering" for the examinations. Yet even where states have absolutely prohibited employment polygraph testing, employers have been known to evade the ban by hiring in a neighboring state which permits such

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1 California, Hawaii, Idaho, Iowa, Montana, Maryland, Nebraska, Pennsylvania, Vermont, Wisconsin.
2 Alaska, Connecticut, Delaware, Maine, Massachusetts, Michigan, Minnesota, New Jersey, Oregon, Rhode Island, Washington, West Virginia

testing, or requiring employees to cross state lines to take the test in an adjoining state where it is legal.

States which license examiners or regulate the conduct of examinations vary widely in their statutes and regulations regarding the types of questions which may be asked during exams, the rights of employees who are tested, or the kind of training required for licensing.

State Regulation Unsuccessful

The regulatory approach has been remarkably ineffective in curbing polygraph abuse. ACLU affiliate offices in states which regulate but do not prohibit polygraphs reported receiving over 1,800 complaints relating to polygraph examinations during 1986. Six ACLU state offices reported over 150 calls each. Polygraphs are one of the single largest sources of complaints received by the ACLU.

Fifteen state polygraph regulatory boards responding to an ACLU survey this year reported a total of only 31 complaints in 1986, 1,736 examiners were licensed. They reported fining one person, suspending the licenses of eight, six of which were quickly lifted, and revoking none. The states responding reported that they had only revoked six licenses in the last ten years. By contrast, ACLU offices in these same 15 states reported 779 complaints about polygraph examinations in the same time period. This leads to the conclusion that state polygraph regulatory boards are for the most part virtually invisible and inactive. In the face of growing employee concern, they produce hardly a trickle of activity.

In addition, simply "regulating" polygraph testing begs the key issue of polygraph validity. No amount of training or experience on the part of an examiner can overcome the glaring absence of scientific evidence supporting the underlying premise of lie detector testing, particularly in the area of pre-employment or random screening. No amount of procedural "safeguards" or detailed statutory instructions on how employment polygraph tests may be conducted can alleviate the fundamental unfairness of claiming to measure an individual's integrity by means of this dubious process.

Conclusion

Twelve years ago, Sam Ervin's staff on the Senate Judiciary Subcommittee on the Constitution in its study on "Privacy, Polygraphs, and Employment" reached a reasoned conclusion which is still valid today:

> Compulsory submission to a polygraph test is an affront to the integrity of the human personality that is unconscionable in a society which values the retention of individual's privacy. Employers have a multitude of less objectionable resources at their disposal for investigating

applicants' backgrounds and employees' performances. Expediency is not a valid reason for pitting individuals against a degrading machine and process that pry into their inner thoughts. Limits, beyond which invasions of privacy will not be tolerated, must be established. The Congress should take legislative steps to prevent... the private sector from requiring, requesting, or persuading any employee or applicant for employment to take any polygraph test.

AMERICAN MEDICAL ASSOCIATION

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DIVISION OF LEGISLATIVE ACTIVITIES

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Assistant Director
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March 10, 1987

Honorable Matthew G. Martinez
Chairman, Subcommittee on
Employment Opportunities
Committee on Education and Labor
U.S. House of Representatives
518 House Office Building - Annex 1
Washington, D.C. 20515

RE: Information for the hearing record - Subcommittee hearing of March 5, 1987: Polygraph testing in the private workforce

Dear Mr. Martinez:

The American Medical Association was pleased to have had the opportunity to testify before the Subcommittee on March 5. At that hearing, the witness for the Association, John F. Beary, III, M.D., indicated that certain articles on polygraph use would be forwarded for inclusion in the hearing record. The following articles for the record are included with this letter:

- A guest editorial published in the March 1986 issue of American Family Physician, Volume 33, Number 3;
- An article on the predictive power of the polygraph published in the March 8, 1986 issue of The Lancet; and
- Two letters to the Editor of the Journal of the American Medical Association, published on January 9, 1987 - Volume 257, Number 2.

If there are questions about these articles, or follow-up questions to the presentation of Dr. Beary and the testimony submitted by the American Medical Association, please forward them to my attention.

Very truly yours,

Bruce Blehart

BB:bt

Enclosure

cc: John F. Beary III, M.D.

1613s

American Family Physician
March 1986
Volume 33, Number 3

had concluded, we happened upon Sid Bernstein's column in a January issue of *Advertising Age* in which he laments a society turned antisocial out of fear. He admits shuddering "at the thought of a whole generation of children growing up with the concept fixed in their minds that people they don't know well are potentially dangerous enemies."

Bernstein cites estimates from Child Find Inc., a private organization concerned with locating missing children, that between 500 and 600 children a year are taken by strangers, whereas hundreds of times that number are abducted by nonresident parents (figures, by the way, that had been brought up earlier in our Florida restaurant conversation).

He goes on to suggest that (a) "kids should be more wary of nonresident parents than of strangers" and (b) "ordinary precautions will serve" children and their parents much better than scaring children "into antisocial behavior." While we won't quibble with Mr. Bernstein's suggestions, we would, however, like to add our two cents' worth on simple semantics. "Strange" is not synonymous with "stranger."

Our well-meaning Florida waitress, while indeed a stranger, was not behaving strangely. If she'd decided to continue her conversation while seated at their table, however, the kids might have had something to be antisocial about.

Guest Editorial

The Polygraph: Does It Really Detect Lies?

About one million Americans are given polygraph tests each year. Despite its widespread use in government and private business, the polygraph, or "lie detector," has not been subjected to much scientific scrutiny until recently.[1] The key question—"Is there a specific physiologic response that predicts the cognitive state of lying?"—is only now being explored with rigor.

The search for a specific physiologic response that correlates with lying has been going on for centuries. An old Bengali practice was to require a suspect to lick a hot iron when charged with a capital crime. If his tongue was burned, he was sentenced to death; if he had enough saliva to prevent a tongue burn, he was set free.

William Marston is regarded as the father of polygraphy in the United States. His device, which measured systolic blood pressure, was used to investigate the 1920 murder of Dr. Robert W. Brown, a prominent Washington physician. However, in the precedent-setting *U.S. v. Frye* case, the court would not accept the test results as evidence because of the lack of scientific support for the lie detector concept.

The modern polygraph is a psychophysiologic recording device. During the interrogation of a suspect, the polygraph records a number of physiologic variables under autonomic control (heart rate, blood pressure, respiration rate and galvanic skin response). Proponents of the polygraph assert that a trained operator can consistently identify a characteristic pattern of physiologic responses on the polygraph tracing that will detect lying with 90 to 97.6 percent accuracy. The operator asks a control question that in most instances will be answered with a lie or will elicit some pattern of arousal. This response is then used to judge responses to subsequent questions dealing with the criminal offense under investigation.

A competently designed study of the accuracy of the polygraph in detecting lies should have the following characteristics: (1) data derived from field investigations, (2) confession-established truth or falsity, (3) absence of bias in the selection

of polygraph records for study and (4) decisions based solely on the polygraph tracings and not on subjective factors. Only two studies in the refereed literature meet these criteria.[1,2]

Of course, the accuracy of a test must be described in terms of both sensitivity (ability to find a positive) and specificity (ability to find a negative). Horvath, who is a polygraph proponent, reported a sensitivity of 76 percent and a specificity of 52 percent (false-positive rate of 48 percent). Kleinmuntz's results were a sensitivity of 76 percent and a specificity of 63 percent (false-positive rate of 37 percent). If the 880 records from the two studies are pooled, the sensitivity of the polygraph is 76 percent and its specificity is 60 percent.

The public debate about the polygraph has been confused by its use in four distinct applications, which vary in their scientific soundness. First, the device is used as a lie detector in making decisions about a crime or a security incident. This application lacks a scientific basis because there is no physiologic response unique to lying; thus, it is impossible to have an accurate lie detector.

The polygraph is also used as a lie detector in pre-employment or security screening. In addition to the point made above, the polygraph's sensitivity rate of 76 percent and specificity rate of 60 percent lead to predictive value calculations that fall into an unacceptable range.

A third application involves using the polygraph as an "electronic scarecrow," a term referring to the psychologic effect that the device can have in prompting the scientifically naive to volunteer confessions. As long as legal and personnel procedures protect people against abuses stemming from the first two applications, security managers may wish to take advantage of the "scarecrow" effect.

Finally, the polygraph is used as a "stress detector." This application might be utilized in an interrogation to develop a lead that could then be investigated by traditional detective techniques. For example, a suspect might display unusual sensitivity to a question about some aspect of a crime. This might lead the detective in charge to reexamine all the available evidence to see whether the suspect could be linked to the crime.

In summary, the polygraph cannot detect lies much better than a coin toss (which is 50 percent sensitive and 50 percent specific); therefore, it is inappropriate to make personnel decisions on the basis of polygraph results. Since the 1923 Federal Court decision in *U.S. v. Frye*, polygraph evidence has not been admissible in federal court proceedings because of the lack of scientific proof that the polygraph can accurately detect lying.

Until state laws are changed so that protection from polygraph abuses is assured, a person who has no choice but to take a polygraph test would be wise to demand a written copy of the test results and a copy of the test tracing. This will be helpful in any subsequent legal action if the situation warrants it.

JOHN F. BEARY III, M.D.
Georgetown University School of Medicine
Washington, D.C.

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2. Horvath F. The effect of selected variables on interpretation of polygraph records. J Appl Psychol 1977;62:127-36.
3. Kleinmuntz B, Szucko J. A field study of the fallibility of polygraphic lie detection. Nature 1984;308:449-50.

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SUCCESSFUL PRENATAL DIAGNOSIS FROM PLACENTAL BIOPSIES IN 6 SECOND OR THIRD TRIMESTER PREGNANCIES

Case no	Gestation (wk)	Indication	Result*
1	20	Advanced maternal age (35 yr)	47 XY + 21
2	27	Advanced maternal age (39 yr), failed amniotic-fluid culture	46 XX
3	14	Sickle-cell anaemia	Affected (SS)
4	19	Non-immune hydrops fetalis with cystic hygromas	45 X0
5	35	Non-immune hydrops fetalis	46 XY
6	37	Exomphalos and cardiac defect	47 XXY

*The diagnosis was confirmed in all cases from fetal or neonatal blood.

chorionic plate. In case 2, the sample was obtained with biopsy forceps (18 gauge) at the time of fetoscopy. Adequate samples for prenatal diagnosis were obtained in each case. In the 3 cases (2, 5, and 6) in which the pregnancy was not terminated no vaginal bleeding or placental complication occurred.

Advanced maternal age is the most common indication for amniocentesis and karyotyping. In case 1 the diagnosis of trisomy 21 was made at 20 weeks following amniocentesis at 16 weeks. The diagnosis was confirmed by direct preparation from chorionic villi obtained at the time of intra-amniotic instillation of prostaglandins for elective abortion. In case 2, an amniotic-fluid-cell culture had failed, and the alternative of karyotyping from fetal blood was impossible because the fetus had already received an intrauterine blood transfusion for severe rhesus disease.[8]

Amniocentesis and fetal blood sampling cannot be done until 16–19 weeks' gestation, and a late abortion resulting from a diagnosis at this stage exposes the patient to the risk of both psychological and physical trauma. But, as case 3 illustrates, patients at high risk for a fetal genetic disorder who present soon after 12 weeks need no longer wait until 18–20 weeks for a diagnosis.

Fetal karyotyping is an essential part of the perinatal management of potentially correctable fetal malformations[9] (cases 4, 5, and 6). Since karyotyping can be done by direct preparation as late as 37 weeks' gestation, CVS is welcome because it avoids the 2–4 week delay of amniotic-fluid-cell culture. Fetal blood sampling may still be necessary when more complex cytogenetic problems require high-resolution chromosome banding.

These results suggest that placental biopsy need not be restricted to the first trimester. We are now investigating the feasibility and safety of the technique throughout gestation and the mitotic index and biochemical profile of the biopsy samples.

Correspondence should be addressed to K. H. N.

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Psychophysiology

PREDICTIVE POWER OF THE POLYGRAPH: CAN THE "LIE DETECTOR" REALLY DETECT LIARS?

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Summary Expanded use of the polygraph as a detector of lies has been proposed in the United States and the United Kingdom. The positive predictive value of the polygraph (ie, the proportion of positive test results that are true positives) was assessed, on the evidence of the best published data for the sensitivity and specificity of the device. In many screening or investigative situations, the predictive value would be poor; most of the positive results would be false positives. Consequently, truthful persons incriminated as liars by the polygraph would outnumber actual liars with a positive result on the test.

INTRODUCTION

THE polygraph is a psychophysiological recording device employed to detect lies. In the United States it has been used by law enforcement agencies in investigations of criminal suspects, and by Government and private industry in the screening of employees for criminal activity. During the interrogation of a suspected liar, the device records physiological variables that are under autonomic control (heart rate, blood pressure, respiration rate, and galvanic skin response). Proponents of the polygraph assert that a trained examiner can detect a characteristic pattern of responses in this record when the subject is telling a lie.[1]

The polygraph has been a source of controversy in both the United States,[2,3] where the device has been used extensively for many years, and the United Kingdom,[4,5] where increased use has lately been proposed. Critics have expressed two major concerns. First, lie detection by the polygraph is based on the unproven assumption that the act of telling a lie is accompanied by a specific and reproducible set of physiological responses. Second, the alleged accuracy of the method is in doubt, since several reviewers of the experimental work have found serious flaws in research design and widely disparate published results of polygraph performance.[6,7]

Can the polygraph really detect liars? If so, how well does it perform? Physicians practising clinical medicine frequently ask similar questions about diagnostic tests—eg, how accurately does exercise treadmill testing identify patients with coronary artery disease? We know that a positive exercise stress test in a 25-year-old symptomless woman does not imply the same probability of coronary artery disease as a similar result in a 60-year-old man with exertional chest pain.

K. NICOLAIDES AND OTHERS: REFERENCES—*continued*

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By the same token, the meaning of a positive polygraph result is dependent upon the population being studied. In both situations, the person interpreting the test result must accept a degree of uncertainty. The findings may reflect false positive or false negative results, and the proportion of these erroneous results may vary among different populations. However, if one knows the performance characteristics of the test (ie, sensitivity and specificity), and the estimated prevalence of the abnormality in the population, one can calculate the probability that a test result confirms or excludes that abnormality. Vecchio[8] defined this concept as the predictive value of a diagnostic test—ie, the probability that a person with a positive test result actually has the disease or that a person with a negative test result does not have the disease.

We discuss here an application of these methods to determine the predictive value of polygraph testing. Specifically, we calculated the probability that a person is lying when the test result is positive, or that a person is truthful when the test result is negative. This study was undertaken because in existing publications on polygraph interpretation the concept of predictive value is either ignored or alluded to only briefly.

METHODS

The analysis consisted of two components. First, we conducted a literature review of empirical studies of polygraph performance to determine sensitivity and specificity of the test. Second, we used Bayes' formula to derive predictive values of the polygraph in several plausible clinical settings.

Literature Review

After a computerised Medline search and a general review of English language publications concerning the polygraph, four basic criteria were used to select studies most likely to have valid and generalisable results (since there was considerable variation in case selection and methodology):

1. Polygraph data were obtained from field investigations of suspected criminals.

2. Truth or falsehood was explicitly stated to have been established by subsequent confession of the guilty party. This criterion ensured a consistent standard of truth against which to compare polygraph interpretations.

3. There was no discernible bias in the selection of records (aside from satisfaction of the first two criteria) or in the assignment of files to evaluators.

4. Evaluators based their interpretations solely on polygraph data.

We identified two studies fulfilling these criteria. In one study, Horvath[9] assigned to ten evaluators the records of 56 suspected criminals, half of whom were verified as guilty and half as innocent by subsequent confessions. These evaluators achieved an average sensitivity of 77% (ie, the probability that a liar has a positive test) and specificity of 51% (ie, the probability that a truth-teller has a negative test). The other study was performed by Kleinmuntz and Szucko.[10] They assigned to six evaluators the polygraph records of 100 suspected thieves, half of whom were subsequently verified by confession as guilty and half as innocent. The evaluators achieved on average sensitivity of 76% (range 64–82%) and a specificity of 63% (range 50–82%). Because the results of these studies are remarkably similar, we used figures of 76% sensitivity and 63% specificity as "average test performance" in subsequent calculations.

To allay criticism that the above studies are not representative of the published work, we also reviewed studies not conforming to our four criteria. For example, we identified four studies performed by examiners using records in their own private polygraph firm.[11–14] Problematic areas in these studies included non-random selection of files and lack of explicit statements as to how truth or falsehood was independently verified. An average sensitivity of 87% and specificity of 88% was achieved by these examiners. Although these studies are methodologically flawed, we will use these figures as "extreme test performance" in subsequent calculations, since they are among the highest published figures for accuracy of the polygraph.

Predictive Value

The positive predictive value [PV(pos)] was calculated as follows:

$$PV(pos) = \frac{\text{true positives}}{\text{true positives} + \text{false positives}}$$

$$= \frac{\text{offenders with a positive test}}{(\text{offenders} + \text{non-offenders}) \text{ with a positive test}}$$

$$= \frac{pa}{pa + (1-p)(1-b)} \qquad \text{(Equation 1)}$$

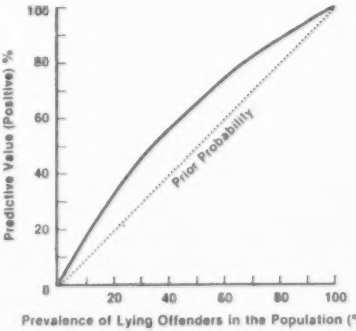
where p = prevalence of offenders; a = sensitivity of the test; b = specificity of the test. The negative predictive value [PV(neg)] is analogously defined as true negatives divided by total negatives:

$$PV(neg) = \frac{(1-p)b}{(1-p)b + p(1-a)} \qquad \text{(Equation 2)}$$

The sensitivity and specificity values for "average test performance" were inserted into equation 1 to construct a curve of the PV(pos) as a function of the prevalence of offenders in the population (an offender being defined as a person who commits a crime and subsequently denies it). We also calculated positive and negative predictive values at several specific prevalences of offenders, using figures for both "average" and "extreme" test performance.

RESULTS

The plot of the positive predictive value of the polygraph (for average test performance) as a function of the prevalence of lying offenders in the population is shown in the figure. The increment in the y-axis between the dashed and solid lines represents the marginal gain contributed by the polygraph over the pre-test probability. For example, when the prevalence of offenders in the population is 5%, the positive predictive value is about 10%. That is, of every 10 positive tests generated in such a population, only 1 is a true positive.



Positive predictive value of the polygraph: variation with the prevalence of lying offenders in the population.

The prior probability (dashed line) is the percentage of times any randomly selected subject will be an offender.

TABLE I—POSITIVE AND NEGATIVE PREDICTIVE VALUE OF THE POLYGRAPH AT VARIOUS PREVALENCES OF LIARS

Prevalence of		Average test performance*		Extreme test performance†	
Liars	Truth-tellers	PV(pos)	PV(neg)	PV(pos)	PV(neg)
0·01	0·99	0·02	0·996	0·07	0·999
0·05	0·95	0·10	0·98	0·28	0·99
0·25	0·75	0·41	0·89	0·71	0·95
0·50	0·50	0·67	0·72	0·88	0·87
0·75	0·25	0·86	0·47	0·96	0·69
0·90	0·10	0·95	0·23	0·98	0·43

*Sensitivity = 0·76, specificity = 0·63
†Sensitivity = 0·87, specificity = 0·88

Table I shows the positive predictive value at various prevalences of liars. When the polygraph is used to screen prospective employees for previous theft, a low prevalence of offenders (eg, 5%) might be expected. Whether one uses the average or extreme test performance, the positive predictive value is low: only 10–28% of persons with positive results will actually be liars. Conversely, 72–90% of these persons will be falsely accused of lying. The same figures would apply to a criminal investigation in which only 1 of 20 suspects is likely to be the offender. For criminal investigations in which the pre-test probability of guilt is intermediate (eg, 50%) the average test performance yields a positive predictive value of only 67%. Thus the incremental gain in certainty after the test is only 17%, and 33% of positive results are still false positives. The extreme test performance yields a positive predictive value of 88%, but even here the number of persons incorrectly labelled as liars (12% of positives) is not trivial.

Table I also shows the negative predictive value. When the prevalence of liars is low (as in the employment screening example), a negative result merely corroborates the known pre-test assumption that nearly all subjects are truthful. However, when the prevalence of liars is high (eg, 90%), the negative predictive value is only 23% for average test performance. This means that fully 77% of negative test results are generated by lying subjects.

The predictive values can be more simply understood by constructing a 2×2 contingency table (see table II). Consider the screening of 1000 prospective employees, of whom 5% have committed previous offences. If we assume that all offenders will lie about their crimes, the number detected by the polygraph will be (number of liars × sensitivity of the test) = 50 × 0·76 = 38. Similarly, if we multiply the number of non-offenders (950) by the specificity of the test (0·63), the polygraph will indicate that 599 are telling the truth. The remaining 351 non-offenders will be read as liars, owing to false positive results. Hence polygraph testing of a random sample of 1000 subjects will yield a total of 389 (38 + 351) positive test results, of which 38 are true positives and 351 are false positives. Thus, the predictive value of a positive test is 10% ($\frac{38}{389} \times 100$). The same result is obtained by substitution of the appropriate values for the variables in equation 1.

TABLE II—2×2 CONTINGENCY TABLE ILLUSTRATING SUBSETS OF RESULTS WHEN 1000 PERSONS ARE SCREENED FOR CRIMES BY THE POLYGRAPH*

Polygraph result	Liars	Truth tellers	Total
Positive (read as lying)	38 true positives	351 false positives	389 total positives
Negative (read as truthful)	12 false negatives	599 true negatives	611 total negatives
Total	50	950	1000

*Sensitivity 76%, specificity 63%, prevalence of criminals 5%.

DISCUSSION

We have shown that the concept of predictive value should be applied to the polygraph in the same way that predictive value is applied to any diagnostic test. Published figures for the sensitivity and specificity of a test may be misleading when background prevalence of the disease (or, in this case, liars or criminals) is not considered. When the prevalence of a condition in a population is low, large numbers of false positive results "drown out" true positives, and the positive predictive value is poor. One might expect such a situation when employers use the polygraph to screen large numbers of prospective employees. When the prevalence is high, the polygraph result adds little certainty to the estimated probability of lying, while the negative predictive value becomes poor. When the background prevalence of offenders or likelihood of lying is unknown, the polygraph result is essentially uninterpretable.

We recognise that our selection criteria excluded studies that deemed the polygraph to be both more and less accurate than those we cited. For example, specificities in field studies have ranged from 12·5% to 94·1%.[6] In addition, several investigations, including that of Kleinmuntz,[10] have shown poor inter-observer agreement in the interpretation of records. Such wide variability in performance should raise questions regarding the validity of the technique. Lykken[7] has argued persuasively that most studies with sensitivities and specificities in the 90% range have serious methodological flaws. It is therefore likely that our figures for "average test performance" are in reality representative of the most accurate capabilities of the polygraph.

One possible criticism of this analysis is that we have inappropriately applied results from studies of criminal investigations to the screening situation. However, no field studies of polygraph accuracy as a screening device have been published. Such investigations would be difficult, if not impossible, to perform because of a lack of independent criteria for truthfulness. Thus one is faced with two plausible alternatives—(*a*) abandon the polygraph in screening since no data exist to confirm its accuracy in that specific setting, or (*b*) apply the available data to that setting. When the latter is done, positive predictive values are extremely poor.

The implications of our calculations are disturbing. Polygraph testing in several settings will generate large numbers of false positive results, thus incriminating many truthful persons. In some circumstances truthful persons diagnosed as liars will outnumber actual liars by a wide margin. Furthermore, the idea of hoping to prove one's innocence by taking a polygraph test is misguided, since the false positive rate among truthful persons may be 37% (ie, 1-specificity) or higher. Supporters of polygraph use might reply that the polygraph should not be the sole arbiter of guilt or innocence, but that results should rather be integrated with other information about a case. We feel that this position is unrealistic; the lure of investing a seemingly "objective" test with excessive confidence seems inescapable.

Our findings are not surprising. There is no rational scientific basis for any machine to detect liars consistently, since there is no known consistent physiological response unique to the cognitive state of lying.[7] Public policy makers

should therefore ponder the very weak scientific foundation upon which the polygraph rests as they make decisions affecting its use in society.

We thank Dr Keith I. Marton for his invaluable assistance.

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Food Aid

FAMINE RELIEF IN AFRICA

NO ONE who succeeds in getting through the House of Commons Foreign Affairs Committee report[1] on Famine in Africa can complain of lack of information. It contains the Committee's findings and their recommendations; transcripts of evidence; many detailed memoranda submitted by interested parties; numerous tables; and 19 appendices.

The report covers two main themes—in the short term the extent and effectiveness of the UK response, and, in the longer term, the causes of famine in Africa and the problems of development aid, with particular reference to the importance of non-emergency food aid.

The Committee took evidence on the immediate UK response from the Minister for Overseas Development, Mr Timothy Raison, and his officials and from representatives of many non-governmental organisations (NGOs) that have been active in relief in Ethiopia and the Sudan. Although in 1983 the Food and Agriculture Organisation, the World Food Programme, and some NGOs were warning of an impending crisis, it was not until the following year that action started on a large scale. The Committee concluded that while there are improvements that could be made . . . "in the dissemination of information, the problem lay more with the reaction of the world community to the warnings rather than to an inadequacy of information". There was concern that we may have been dragging our feet, but, as the Minister pointed out, the British Government could not respond officially until approached by the Government of Ethiopia. The response, when it came, was through a variety of channels—from Overseas Development Administration (ODA) funds allocated for disasters; as bilateral food aid; as aid through the European Community and UN agencies; and by contributions to NGOs. The amounts (to £ million) provided by the British Government through all these channels in 1983 and 1984 were as follows (p 90, table 1):

	1983	*1984*
Ethiopia	1·89	5·41
Sudan	10·42	4·85
Total for 36 African countries	44·36	68·99

During that period the public also gave some £20 million through various charities. One member of the Committee suggested that the British Government had not lived up to the expectations of the public and should match these contributions pound for pound. The Minister was naturally unwilling to accept any such open-ended commitment. His response to any accusation of niggardliness was that in 1984 approximately £230 million was spent on aid to Africa. It was difficult to decide how much should be allocated to one country at the expense of others and how much should be provided for relief at the expense of development. The Committee was unhappy that all the provision for relief has been made from within the existing ODA budget and made a very positive recommendation (no xxxii): "We consider that it is not acceptable that almost the entire costs of the UK response to the crisis should fall on the previously agreed ODA budget. The emergency is of such a degree that it must be regarded as a new situation and substantial new money should be provided to help with it".

The report goes into some detail on the administration of relief, particularly in Ethiopia. A special difficulty was that of getting food to the people of areas such as Tigre that are in revolt against the Government. Indeed, as is well known, it was suspected that in those areas the Government of Ethiopia was using famine as a political tool. Here, because of their greater independence, the voluntary agencies were able to play a particularly important role, not possible for official aid donors.

Britain was, of course, only one among many countries providing relief. The number and type of donors—bilateral, multilateral, and non-governmental—made coordination of the planning and delivery of supplies and their distribution in the field extremely complex. The European Community's bureaucratic and cumbersome procedures were criticised. A member of the Committee described the flow-chart of their processes for making and executing decisions as "snakes and ladders". However, ODA representatives made it clear that these procedures have been streamlined and simplified for dealing with emergencies.

There has been much discussion in the press of how the distribution of supplies has been hampered by inadequacy of ports and roads, lack of transport, and so on. It became clear that though decisions may be made in London, it is almost impossible for the British Government to monitor what actually happens on the ground. The costs are of some interest—it was estimated that the cost of providing one ton of cereals is made up of: purchase price £110; shipping £35; and local distribution at least £100. Thus although it may be argued that the food itself is not a genuine donation because it comes from surplus and unsaleable stocks in North America and Europe and that it should be charged to agricultural rather than development budgets, the substantial transport costs do represent a real contribution. In the case of the RAF airlift, which provided nearly 11 000 ton of supplies at an estimated cost of £6 million, the transport component is clearly very much greater than that of surface delivery.

The Committee evidently did not consider it within its terms of reference to review the UK contribution to the

ommend that this test be done routinely. Based on my informal knowledge of medical group practices throughout the country, I estimate that no more than about 40% of groups routinely test for α-fetoprotein at this time, outside of California.

Two physicians may have varying opinions and patterns of practice without one or the other necessarily falling short of the standard of care. While I don't condone flagrant disregard of the body of scientific knowledge required to date, there should be room in our profession for disagreement. I believe Dr Weiss and I can recommend a certain test to our patients as being a good idea without that necessarily representing the standard of care.

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Severe Diarrhea in Pneumococcal Bacteremia: Croupous Colitis

To the Editor.—Greene et al[1] report a patient with sickle cell anemia who died of fulminant pneumococcal bacteremia and had watery diarrhea as a symptom. We recently saw a patient without sickle cell anemia but with apparent hyposplenia and pneumococcal sepsis who was initially seen with severe diarrhea.

Report of a Case.—A 54-year-old black woman was admitted to the hospital with a two-day history of fever, shaking chills, nausea, and vomiting. She reported severe profuse diarrhea with bowel movements occurring almost every hour. Her history was notable only for hypertension that was treated with thiazide diuretics. At time of admission, her temperature was 39.4°C; blood pressure, 116/60 mm Hg; pulse, 100 beats per minute; and respirations, 20/min. She was obese, lethargic, and disoriented. The neck was supple and neurological examination was nonfocal. Scattered coarse rhonchi were heard throughout her lungs and there were no heart murmurs. Results of the abdominal examination were normal and findings from the guaiac test for blood were negative. There was fecal contamination of the vagina. Her hematocrit was 45% (0.45). The leukocyte count was 14 700/mm³ (14.7 × 10⁹/L), with 79% (0.70) polymorphonuclear leukocytes, 26% (0.26) band cells, and 1% (0.01) myelocytes. Other laboratory values included the following: serum sodium, 135 mEq/L (135 mmol/L); potassium, 2.8 mEq/L (2.8 mmol/L); chloride, 98 mEq/L (98 mmol/L); carbon dioxide content, 23 mEq/L (23 mmol/L); blood urea nitrogen, 15 mg/dL (5.4 mmol/L); serum creatinine, 1.8 mg/dL (159 μmol/L); urie acid, 7.4 mg/dL (440 μmol/L); lactate dehydrogenase, 362 units/L (362 U/L); aspartate aminotransferase, 71 units/L (71 U/L); and creatine kinase, 3040 units/L (3040 U/L) (100% MM component). Tests for stool electrolytes showed a sodium level of 71 mEq/L (71 mmol/L) and a potassium level of 74 mEq/L (74 mmol/L). The osmolality was 325 mOsm/kg (325 mmol/kg). The chest roentgenogram was clear, without evidence of pneumonia.

After lumbar puncture was performed and blood and stool cultures obtained, therapy was begun with ampicillin and gentamicin. Cerebrospinal fluid samples were normal. *Salmonella*, *Shigella*, and *Campylobacter* showed no growth on stool cultures. Smears for fecal leukocytes were negative, as were three stool specimens examined for ova and parasites (including *Cryptosporidium*[2]). Two sets of blood cultures showed growth of *Streptococcus pneumoniae* susceptible to penicillin. Therapy was switched to intravenous penicillin, and the patient's condition rapidly improved, with prompt resolution of the diarrhea.

Because the source of this patient's bacteremia was unclear, further studies were done, including serum protein electrophoresis, echocardiogram, computed tomographic scan of the head, and hemoglobin electrophoresis; all were normal. A liver spleen scan showed the spleen to measure 3 to 4 cm in its greatest span, which was consistent with hyposplenia.

Comment.—The association of *S pneumoniae* bacteremia with gastrointestinal tract symptoms such as diarrhea has been described in patients without apparent focus of infection,[3,4] and in patients with pneumococcal peritonitis.[5] In 1909, Sir William Osler noted that pneumococcal bacteremia can occur without a local lesion and that the clinical picture may resemble typhoid septicemia.[6] Furthermore, he associated lobar pneumonia with gastrointestinal tract symptoms, when noting that a "croupous colitis may induce severe diarrhea" (in cases of lobar pneumonia).[6] More recently, the pneumococcus has been cultured in the stool samples of a 4-year old with bloody diarrhea.[7] In our patient the findings were consistent with a secretory diarrhea that resolved without specific therapy. The diarrhea could be a nonspecific manifestation of sepsis, part of the syndrome of pneumococcal bacteremia, or the effect of an undescribed enterotoxin that stimulates secretion of water and electrolytes in a way similar to enterotoxigenic *Escherichia coli* or cholera.

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The Predictive Power of the Polygraph: The Lies Lie Detectors Tell

To the Editor.—The American Medical Association's (AMA) Council on Scientific Affairs[1] correctly recommended that the polygraph not be used in preemployment testing and security clearance. Its review of the data on the validity and accuracy of the test for this form of screening is in line with findings in criminal investigations.[2] These data show that the range of false-positives in a criminal investigation is from 18% to 50%, with the latter upper-range percentages representing a level of performance that is a good deal inferior to random decision making.

The point is shown clearly in a recent *Lancet* article[3] on the predictive power of the polygraph. The authors analyzed two criminal case studies[2,4] in terms of the specificity and sensitivity performance characteristics of the polygraph—ie, the probability that a person with a positive test result is actually guilty or that one with a negative result is not guilty. Their conclusion was that "polygraph testing in several settings will generate large numbers of false positive results, thus incriminating many truthful persons."

Similar findings and conclusions were also reported in another article,[5] which analyzed the polygraph charts of 207 criminal suspects scored independently by 14 polygraphers. The report's author concludes that the polygraph's use in criminal investigations, because it is "predicated on implausible, even fantastic [physiological and psychological] assumptions is wrong nearly one-third of the time overall [and] an innocent person has almost a 50:50 chance of 'failing' the lie detector."

Finally, I call attention to the inadequate training and biased motivation of

polygraph interpreters. With the exception of a handful of polygraphers, the training of the vast majority of polygraphers consists of six-week to six-month post–high school crash courses in polygraphic examination and interpretation. These modest credentials barely qualify them to operate the necessary instrumentation. The motivational factor causing their unacceptably high "deceptive" decisions is their eagerness to serve the paying client, whose main interest is to identify guilty suspects. This motivation seriously biases the findings against the nonpaying client, who is likely to be an individual with limited resources and is unlikely to be a source of repeat business.

In short, polygraphic interrogation in criminal investigations lacks scientific merit. Therefore, the AMA's Council on Scientific Affairs might want to consider recommending that its use in criminal cases also be curtailed. In so doing, the AMA would endorse a policy that may soon become the law of the land.*

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To the Editor.—We were particularly interested by the recent report on the polygraph,[1] and commend the Council on Scientific Affairs for presenting a comprehensive overview of the current state of knowledge. The report drew attention to the problem of false-positive and false-negative errors in the interpretation of polygraph records. We recently attempted to quantify this problem by reviewing the published literature to determine the sensitivity and specificity of the polygraph and then using these data to calculate the predictive value of polygraph screening for the detection of liars.[2]

We found the predictive power of the polygraph to be poor, since it supplies little new information over the "prior probability" that a subject is telling a lie. For example, if an investigator screened a group comprising 50% liars by flipping a coin, diagnosing a "liar" every time it came down heads, he would detect the actual liars in the group with an accuracy not far short of the polygraph. This finding is not really surprising, since there is no evidence for the existence of a "Pinocchio response": telling a lie does not make one's nose grow an inch longer, nor does it stimulate a unique and specific pattern of physiological responses.

However, our most alarming observation was the large number of false-positive findings that will occur when the polygraph is used as a screening test. Consider a situation in which the polygraph is used to screen a number of people for an offense of which 5% of the suspects may be guilty (eg, stealing or divulging confidential information). All deny any guilt, so that a group of 1000 suspects would include 50 liars. Assuming a sensitivity of 76% and a specificity of 65%,[3] the polygraph would yield a true-positive finding for 38 of the 50 liars. The high detection rate sounds very good until one considers the false-positive findings in the remaining 950 people who told the truth. Since the specificity of the test is poor, the polygraph would incorrectly implicate 351 of the truthful people as liars, so that the false-positives will outnumber the true-positives by more than nine to one. This suggests that the polygraph is as dependable as a fire alarm that turns in nine false alarms for every true warning of a fire. However, when fire fighters arrive on the scene, they can rapidly determine if a building is on fire or not and ascertain whether the alarm was true or false. Unfortunately, the accused person who has fallen victim to a false alarm from the polygraph has no equally simple way to prove that he or she is really telling the truth. What this means in practice is that a large number of honest people will continue to be unjustly implicated as liars, criminals, and traitors so long as the polygraph continues to be used and trusted as a "lie detector."

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1. Council on Scientific Affairs: Polygraph. JAMA 1986; 256:1172-1175.
2. Brett AS, Phillips M, Beary JF: Predictive power of the polygraph: Can the "lie detector" really detect lies? Lancet 1986;1:544-547.

The Safety of Nuclear Power Plants in the United States

To the Editor.—The purpose of this letter is to clarify a statement made by H. Jack Geiger, MD, in the article entitled "The Accident at Chernobyl and the Medical Response."[1] Dr Geiger states that the design features found at Chernobyl are similar to those in many US reactors. In particular, he mentions some characteristics of the design of the Chernobyl containment structure. He does not, however, compare the design features of the Chernobyl and US containment structures correctly.

The similarities between the design features of the containment structure at Chernobyl and those of the US plants are more apparent than real. Important parts of the Chernobyl primary coolant system were outside the containment; these became the openings through which release of the fission products first took place. There is no corresponding feature for American reactors. Second, analysis indicates a much more limited protective capability for the containment that existed at Chernobyl, because of the confinement of small containment volumes and tortuous pathways for any released steam to the suppression pool. In effect, the suppression pool protected more against the effect of primary coolant system leaks from piping below the reactor, and not as much for substantial leaks that may have occurred within the core region.

The containment structures of nuclear reactors in the United States must offer a high degree of protection against severe accidents, leading to melting and dispersion of the entire reactor core. The Chernobyl type of containment would not be capable of this.

There are also great differences between the two types of containment design in the control of combustible gases. The Chernobyl containment is inert only in the region of, and immediately surrounding, the reactor core, to avoid oxidation of very hot graphite. In the US designs, control of combustible gases is provided throughout the containment to avoid combustion of hydrogen if this were produced in a severe accident. This control is realized in various ways among the US designs: continuous inerting, deliberate ignition systems, and large-pressure capacity.

Finally, it should be noted that Chernobyl had important features not found in US commercial, light-water reactors. Chernobyl had positive feedback that caused any increase in power to accelerate at a more and more rapid rate unless quick steps were taken to stop the runaway. It also had a very slow-acting system to control such events. These are the design weaknesses that made destruction of the Chernobyl reactor possible. They are not found in the design of US light water reactors.

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John F. Schlegel, PharmD
President

D. Stephen Crawford
Chairman of the Board

April 29, 1987

The Honorable Patrick Williams
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Williams:

The American Pharmaceutical Association (APhA), the National Professional Society of Pharmacists, supports H.R. 1212, the Employee Polygraph Protection Act, which would prohibit the use of polygraph testing in the private sector workplace.

APhA's position is that polygraph tests should not be used as a means of pre-employment screening in pharmacies; should not be used in pharmacies for routine "security" checking of employees; and should not be used in pharmacies in the course of investigations for cause.

APhA recognizes the problem of internal theft and is aware of efforts to curb this problem through the use of polygraph tests. However, we hold that the use of polygraph tests is inappropriate because of serious issues regarding reliability of the tests, the competency of polygraph examiners, and control and use of test results. The use of polygraph tests also raises constitutional and invasion of privacy issues.

In sum, there is not satisfactory scientific evidence to show that polygraph tests detect deceptive behavior. Thus, APhA believes that the protections proposed in H.R. 1212 should continue to extend to pharmacists and other pharmacy employees.

Thank you for the opportunity to provide these comments. We commend you for introducing this legislation.

Sincerely,

Joan Zaro Saah

Joan Zaro Saah, PhD
Senior Vice President

JZS/kac

Bakery, Confectionery and
Tobacco Workers International Union

MAR 25 1987

March 20, 1987

The Honorable Matthew G. Martinez
Chairman
Employment Opportunities Subcommittee
402 Cannon House Office Building
Washington, DC 20510

Dear Chairman Martinez:

On behalf of the more than 140,000 members of the Bakery, Confectionery and Tobacco Workers International Union, I want to commend you for holding this hearing on such a vitally important subject. I want to thank you for the chance to add our union's views into the official record of this distinguished subcommittee.

My union strongly supports this act and I urge you to support H.R. 1212, the bill that will ban the use of the polygraph, the so-called "lie-detector" in the private employment sector. This bill is identical to H.R. 1524 of the 99th Congress, a bill that swept through the House of Representatives with 167 cosponsors and whose amended version won overwhelming bipartisan passage.

Daily the scientific evidence grows clearer - the "lie-detector" cannot measure lies. Rather it can only record physiological changes and stress that are often caused by fear and anxiety, two direct results of being tested by a machine in the first place.

In 1983, the Congressional Office of Technology Assessment (OTA) conducted a major study that came to some interesting conclusions. In short, the study found the polygraph to be generally unreliable. Some of the exact figures that the study found are as follows:

- False negatives ranged from 29.4% to 0%
- False positives ranged from 75% to 0%
- Inconclusive results ranged from 0% to 25%

Clearly the validity of the polygraph is murky at best.

This same study was reasserted by another study that was completed just this year by OTA. "The Office of Technology Assessment has concluded that a two-year effort by the defense department to determine the value of widespread polygraph screening produced no useful data."

Even more upsetting is that the use of the polygraph has reached unconscionable levels in the private employment sector. According to industry estimates, more than two million polygraph exams are given annually. This number is even more astounding when compared to the fact that less than 25% of this number were given only five years ago.

Many states have their own laws that regulate or prohibit the use of these degrading machines. However, there are many violations of these laws. For example, in the District of Columbia, it is illegal to require or request an employee or potential employee to take a polygraph exam. Yet many applicants are merely taken across the Potomac River to Virginia where these exams are legal.

The time has come for federal legislation to ban the "lie-detector" and protect the millions of workers who are subjected to this humiliating ordeal. Congressman Williams' bill H.R. 1212 is such a bill and I urge you to support it and aid its immediate passage.

Sincerely,

John DeConcini
International President

JDeC:bkp

FLORIDA DEPARTMENT OF STATE
George Firestone
Secretary of State

April 27, 1987

Honorable Matthew G. Martinez
United States Representative
Chairman
Subcommittee on Employment Opportunity
Committee on Education and Labor
United States House of Representatives
Washington, D.C. 20515

Dear Representative Martinez:

As the state official ultimately responsible for the regulation of the polygraph industry in Florida, I would like to submit the enclosed polygraph position statement to be entered into the official records of your committee hearings on House Bill 1212. This is the same position statement that was entered into the hearing records of the Senate Committee on Labor and Human Resources last year.

I feel that regulation of the field of polygraph is a state's rights, jurisdictional issue. Only at the state level can the unique business and economic needs of our local communities be properly addressed relative to various occupational and professional practices.

In Florida, we have a regulatory act that has proven, over a 20 year period, to be very effective in providing polygraph services within standards designed to ensure the quality of the service offered.

Currently, there are 500 fully licensed polygraph examiners providing polygraph testing services in Florida. There are over 300,000 polygraph tests administered in Florida annually.

As a result of the hearings held last year, there was extensive media coverage related to polygraph. As you know, this type of coverage normally has the effect of generating an elevated level of awareness, interest or complaints. Despite this media and the fact that each examiner is required to post a notice that states that complaints can be filed with the Department, only 2 validated complaints were filed during 1986. I consider this as conclusive proof that appropriate standards and regulations provide the tools necessary for public protection. Prohibition is not the answer!

FLORIDA-State of the Arts
The Capitol Tallahassee, Florida 32301 (904) 488-3680

As we enter the third decade of regulation in Florida, we can be proud of the record of professionalism achieved and maintained by a highly motivated and competent polygraph industry.

Again, I would respectfully submit to you that the issue of prohibition or regulation is one that should be decided at the state level. The need for federal intrusion into the field of polygraph regulation is not supported by the facts we have gathered concerning polygraph practices in Florida. Rather, the facts support the need for standards and an appropriate level of regulation at the state level. Regulation, rather than prohibition, is the answer. It works in Florida.

Sincerely,

Secretary of State

GF/dl

Enclosure

FLORIDA DEPARTMENT OF STATE
George Firestone
Secretary of State

POLYGRAPH POSITION STATEMENT

by

Florida Secretary of State George Firestone

April 18, 1986

Recent congressional activities have raised questions as to the propriety of polygraph usage by business and what its proper role should be in the business and labor communities. As the state official ultimately responsible for the regulation of this industry, I deem it necessary and appropriate to present the following comments.

The State of Florida began regulating the polygraph industry with the enactment of statutes in 1967. Polygraph, as with other professions, fulfills a demonstrated need of the public. Polygraph provides a necessary method of objectively determining truth. It is imperative that services, which by their very nature pose a possible risk to the public, be strictly controlled to assure the protection of the public. To this essential objective, the Secretary of State's office is charged with establishing and enforcing standards, restrictions and practices by which the polygraph industry must operate or encounter appropriate consequences.

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I have a personal interest in the effective regulation of polygraph since, as a state legislator, I was directly involved with the enactment of polygraph legislation almost twenty years ago. Since that time, I have witnessed the many positive contributions that regulated polygraph has provided to both business and labor.

Concurrently, the number of complaints against examiners has been negligible. There are 519 fully licensed examiners in Florida who conduct over 300,000 tests annually. State law mandates that each subject be notified of his right to file a complaint with this Department. Despite this fact, only one validated complaint against an examiner has been filed in the past year. One must conclude that an informed public does not share the purported perception of misconduct within the profession.

Florida is a particularly transient state where background investigations are frequently impossible to perform. Proponents of SB 1815 have suggested that such background investigations would offset the requirement for polygraph in pre-employment screening. In reality, the possibility of obtaining pertinent background information has been greatly reduced. Increasing numbers of liability litigations involving negative references by previous employers have discouraged the practice of providing references regarding performance habits. Applicants will generally omit negative references and provide only positive references or, in most cases, none at all, which may result in critical information not being exposed to the potential employer.

Residents who have transferred from other states often have great difficulty in finding employment because of their inability to establish proof of good moral character and verification of previous employment behavior. This problem is exacerbated in urban areas where Latin, Haitian and other immigrants are prevalent. Unfortunately, it is frequently difficult for proprietors, unable to obtain accurate background information, to differentiate between the criminal element and those who seek a productive place in our society. Polygraph provides the business sector an objective method of minimizing risk to itself and the public by assuring the integrity of potential employees. This is especially useful where the absence of any other references might otherwise negate the possibility of employment. Polygraph acts as a deterrent against those with culpable backgrounds who realize the probability of exposure through polygraph, where it might otherwise go unchecked.

Recent litigation has also established the obligation of businesses to conduct adequate background evaluations to assure the protection of the public. Rulings from several cases nationwide support this statement. One recent pending suit involves a carpet cleaning company whose employee raped and murdered the child of a client. The proprietor has been sued for failure to perform adequate employment screening, specifically for not using an available resource -- polygraph. The courts have consistently concluded that background verification and performance factors are crucial in determining the integrity of a potential employee where the business is entrusted with access to the home or personal property of the public.

In the absence of polygraph, proprietors may be forced to lay the burden of proof in background verification on the applicant in order to be eligible for employment. This alternative, should it prove to be the only recourse, would drastically reduce employment opportunities for immigrants and other applicants who have not yet established long-term residence, but who, if provided the opportunity to establish integrity, could contribute positively to the labor force.

Several examples can be cited where polygraph has not only benefited management, but has also favorably supported labor:

- Cash shortage by bank teller; employer is forced to take punitive action ranging from transfer to dismissal. Employee remains under cloud of guilt with no recourse in the absence of polygraph.

- An inference of wrongdoing arises; more than one person is accountable. Employer is forced to respond by multiple dismissals in the absence of polygraph.

- Employee is in service-related business (e.g. hotel, pest control) and is accused of theft. Employer is forced to dismiss in the absence of a truth-finder, polygraph. (It is not uncommon for clients to subsequently advise employer that the object thought to have been stolen had only been misplaced.)

** Applicant for position has an unfavorable employer reference resulting from unwarranted confrontation. In the absence of polygraph, prospective employer has no means of determining if applicant is truthful in order to make an objective hiring decision.

Prohibiting the use of polygraph would remove one of the only safeguards an employee has with which he can exonerate himself of suspicion or accusation.

Studies have consistently shown that culpable employee actions result in a major cost increase to businesses, an increase which is ultimately passed on to the consumer. A 1977 United States Department of Commerce study indicated that costs resulting from employee crime amounted to $43 billion annually. A 1983 survey conducted by the National Institute of Justice, United States Department of Justice, used a random sample of employees at all occupational levels from 47 corporations. Based on anonymous responses, the study revealed that one-third of the employees admitted to stealing from the company. Two-thirds of the group admitted guilt in other types of misconduct including drug abuse, falsification of time sheets and sick leave abuse.

The fallacy of using reference checks as a substitute for polygraph is evidenced in a Minnesota court ruling. A tenant of an apartment complex brought suit against the complex owner after being sexually assaulted by the manager. The manager, who had a criminal record and was on parole at the time he submitted his employment application, gave two references. They were subsequently determined to be his mother and sister. The court rules negligent hiring in that the employment screening was not commensurate with the degree of risk posed by the employee's position.

I concur that the public has a right to privacy and that this right must be protected. I believe that, with stringent regulation, this protection can be provided without prohibiting the use of a service which has consistently proven that its merit to society outweighs its risk.

It is a fact that polygraph has been condoned and its use increased in the interest of national security. In the wake of the Walker spy trial, the Congress sanctioned increased use of polygraph in the screening of government employees. By a vote of 331 to 71, the House recognized the effectiveness, validity and propriety of polygraph use in the national interest. In light of such recognition, their current position that the use of polygraph should be denied to American business is untenable. To further compound the situation, HR 1524 provides exemptions not only for employees of all levels of government, but also for certain select industries including pharmaceuticals, armored car guards, security guards, day care and nursing home employees and gambling casino employees.

Can we selectively protect certain rights of labor, government and business while denying the same rights to other select groups? HR 1524 accepts the validity, accuracy and propriety of polygraph use for some interests, but not for others. Cash handlers such as armored car personnel and gambling casino employees are exempted from the bill, while others such as bank tellers and grocery store cash handlers are not. Is a bank teller, being in a position to take or be a party to the theft of funds, any less a security risk than the armored car personnel who guards it? Conversely, doesn't the armored car employee have the same constitutional right to privacy as the bank employee? If the basis for the proposed virtual prohibition of polygraph in the private sector is contingent on constitutional rights, that position must hold constant for the rights of all prospective employees in both the public and private sectors. The reason suggested for exempting gambling casino employees from the restrictions of HR 1524 was that these employees could be laundering drug money. Doesn't this same situation apply to bank employees to an even greater degree?

As one of twenty-eight states with polygraph licensing laws, the State of Florida is aggressively pursuing the reduction of potential abuse of polygraph by proposing even stronger legislation than that currently in place. It is my personal and professional belief that polygraph serves a vital interest to all sectors and provides an essential method for the exoneration of guilt as well as the confirmation of deception. As in all professions which serve the public, regulation, not prohibition, is the key to protection.

STATEMENT

of the

FOOD MARKETING INSTITUTE

for inclusion in

THE HEARING RECORD ON H.R. 1212

THE EMPLOYEE POLYGRAPH PROTECTION ACT

March 17, 1987

1750 K Street, N.W.
Suite 700
Washington, D.C. 20006

FMI appreciates the opportunity to submit its views to be included in the Hearing Record on H.R. 1212, the Employee Polygraph Protection Act. FMI opposes H.R. 1212 and favors the Young-Darden approach, H.R. 1536, which will set minimum federal standards for administering polygraph examinations.

The Food Marketing Institute (FMI) is a nonprofit association conducting programs in research, education and public affairs on behalf of its 1,500 members -- food retailers and wholesalers and their customers in the United States and overseas. FMI's domestic member companies operate more than 17,000 retail food stores with a combined annual sales volume of $180 billion -- half of all grocery sales in the United States. More than three-fourths of FMI's membership is composed of independent supermarket operators or small regional firms.

Theft, or shrinkage, is one of the most serious threats to the successful operation of a supermarket. Because the retail grocery industry operates on a slender one percent profit margin, FMI members are deeply concerned about controlling shrinkage. The costs of shrinkage, as is the case with all operational costs, must eventually be passed onto the consumer in the form of higher prices.

In the seventh annual Survey of Security and Loss Prevention

in the Retail industry conducted for the National Mass Retailing Institute, in 1985, Arthur Young and Company found that 46% of food retailing shrinkage could be attributed to employee theft, 27% to shoplifting, 15% to vendor theft and 12% to errors in paperwork and accounting. In other words, more than one half of all losses of inventory result from actions by employees. This is a controllable cost and it must be controlled.

Due to this unusual rate of employee theft, FMI's members use polygraph tests for both pre-employment screening and investigation of theft when it occurs. In addition to background checks, credit and reference checks, the polygraph is one additional tool used to promote the hiring of better quality employees. By using the polygraph retailers can detect, among other things, drug or alcohol problems which the background check may not indicate. As one can imagine, it is important to discover substance abuse problems before the individual is hired to work in a pharmacy or to operate a fork lift for a food distribution center. It is possible, for instance, that the company could be held liable should an employee have an accident while operating a fork lift when intoxicated.

A food chain operating in the western region estimated that it costs between $600 and $800 to process a new employee. This investment is worthwhile, for hiring honest and reliable employees not only helps control shrinkage but also ensures a lower employee turnover rate in the company. Another FMI retailer tells us that by

using the polygraph, employee morale is improved because employees know they are working with carefully screened individuals. If losses do occur, the honest employee can be exonerated through the polygraph.

While we unequivocally oppose H.R. 1212 as presently drafted, we recognize there is a need for balanced and effective legislation in this area. FMI supports the approach embodied in H.R. 1536, which was introduced by Rep. Bill Young (R-FL) and Rep. Buddy Darden (D-GA). H.R.1536 sets minimum federal standards for administering the polygraph exmaination and minimum qualifications for examiners.

Any alternative must protect the rights of the indivdual being tested. For example, individuals should retain the right to refuse to take a polygraph examination and polygraph results should not be grounds for refusing to hire an otherwise qualified applicant. In addition, an examiner must must not be allowed to inquire about an individual's religion, sexual preferences, political views or feelings regarding labor unions.

FMI urges the committee to report legislation that seeks to eliminate the abuses that can occur during the administration of a polygraph examination rather than imposing a blanket ban on polygraph use by the private sector. Please feel free to contact us if we can supply additional information.

Hotel Employees & Restaurant Employees International Union AFL-CIO CLC

MAY 04 1987

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March 5, 1987

The Honorable Matthew G. Martinez
Chairman - Subcommittee on Employment Opportunities
402 Cannon House Office Bldg.
Washington DC 20515

Dear Mr. Chairman:

I congratulate you and your Committee for holding a hearing on the use and abuse of so-called "lie Detector" tests in employment, and I thank you for the opportunity to add our union's views to the permanent record of this hearing. The Hotel Employees, Restaurant Employees International Union, strongly supports the legislation which Congressman Williams of Montana and one-hundred-twenty-five of his colleagues have introduced to prohibit employers engaged in interstate commerce from subjecting employees and applicants for employment to the injustice and humiliation of "lie-detector" tests.

More than twenty years ago a Congressional subcommittee concluded: "There is no lie detector; neither machine nor human. People have been deceived by a myth that a metal box in the hands of an investigator can detect truth or falsehood." Today, however, "lie detectors" are so popular among employers that over two million workers and applicants for employment are subjected to these tests every year.

It is difficult to understand why our government does not give employees and job applicants the protection from "lie detectors" routinely granted to indicted suspects in criminal proceedings. American courts restrict the use of "lie detector" test results as evidence in trials, and indicted criminal suspects cannot be forced to take the tests. How ironic that criminals cannot be convicted by a "lie detector," but workers can be denied jobs and branded as liars by these same devices.

The "lie detector" is allowed to act as both judge and jury in the workplace, without even giving workers the right to know why they "failed" the test and were denied employment. Workers cannot clear their names and records because they do not even know the nature of the accusations against them. Worst of all, an employee or job applicant may be denied employment again and again for "failing" one "lie detector" test because successive interviewers want to know whether a job applicant has ever "failed" a test.

Objective investigators of "lie detector" test validity have concluded the devices cannot accurately and consistently distinguish truth from deception. The American Psychological Association adopted a resolution on February 1, 1986 stating that scientific evidence on the accuracy of polygraph tests "is still unsatisfactory." The resolution was adopted unanimously by the 115-member council of the Association after two panels studied the matter for more than a year.

The Congressional Office of Technology Assessment (O.T.A.) conducted a comprehensive evaluation of polygraph validity in November of 1983 and concluded that: "there is very little research or scientific evidence to establish polygraph test validity in screening situations, whether they be pre-employment, preclearance, periodic or aperiodic, random, or 'dragnet.'" O.T.A.'s review of field studies of polygraph validity showed polygraph test results vary widely and can often be less accurate in distinguishing honest people from liars than flipping a coin!

The root flaw of all "lie detectors" is that there is no physiological response specifically and exclusively associated with lying -- there is no such thing as a "lying response." Many different factors and conditions can affect the outcome of a "lie detector" test and cause an honest person to be labeled a liar, or cause a dishonest person to escape detection. Physiological abnormalities such as blood pressure problems, heart conditions, colds and headaches can affect the outcome of the test. Fatigue, drugs, alcohol, and body movements can also affect "lie detector" test results.

The sad consequence of basing employment decisions on inaccurate "lie detector" tests is that employers are refusing to hire able employees, putting honest citizens in the unemployment line, and hiring deceitful people and those who know how to beat the tests. In fact, it has been estimated that at least 200,000 Americans are denied jobs every year because employers rely on inaccurate "lie detector" tests to make personnel decisions.

Several states have tried to control the abuse of "lie detectors" in the workplace by licensing and regulating the operators of the machines. But licensing laws are counterproductive if the goal of legislators is to protect citizens from abuse at the hands of "lie detectors." The danger and the irony of licensing "lie detectors" is that is legitimizes the machines, their operators, and the entire pseudo-scientific process of "lie detecting". A survey reported in Personnel Journal in February, 1978, found that more businesses use the polygraph in states with licensing requirements than in states with no regulation at all. Clearly, licensing statutes thwart the best intentions of their supporters. They begin as efforts to protect people and yet result in even greater abuse.

Twenty-two states and the District of Columbia have enacted laws to restrict the use of "lie detector" tests in the workplace, and yet the number of employees and job applicants who must submit to these tests continues to grow. These state statues speak eloquently of the desire of state legislators to protect employees and those who seek employment from the indignities and dangers of "lie detectors." But these state prohibitions and restrictions are inherently inadequate. Employers evade state prohibitions by hiring in neighboring states with no restrictions, and then "transferring" employees into the state which has restrictions. Without a federal law to protect workers from the abuse of "lie detector" tests, employers who are intent on subjecting their employees and prospective employees to these tests will continue to fine it is a simple and inexpensive proposition to evade the law merely by crossing state borders.

The legislation which Mr. Williams has introduced to stop the abuse of "lie detectors" in employment will help to remove fear and intimidation from American's workplaces and restore dignity to honest American workers. Thank you for holding this hearing and giving me the opportunity to present our union's views.

Cordially,

Robert E. Sullinno
Legislative Representative
HEREIU

STATEMENT OF

THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

TO THE

EMPLOYMENT OPPORTUNITIES SUBCOMMITTEE

EDUCATION AND LABOR COMMITTEE

U. S. HOUSE OF REPRESENTATIVES

REGARDING H.R.1212

A BILL TO PROHIBIT THE USE OF LIE DETECTORS BY EMPLOYERS

MARCH 11, 1987

STATEMENT OF
THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO
TO THE
EMPLOYMENT OPPORTUNITIES SUBCOMMITTEE
EDUCATION AND LABOR COMMITTEE
U. S. HOUSE OF REPRESENTATIVES
REGARDING H.R.1212
A BILL TO PROHIBIT THE USE OF LIE DETECTORS BY EMPLOYERS

MARCH 11, 1987

The International Brotherhood of Electrical Workers (I.B.E.W.) strongly supports the legislative concept that workers in private employment should be protected from intrusive and unnecessary intimidation and interrogation brought about through the use of lie detector tests. In equally strong terms, the IBEW, our members, and their families oppose the ill-conceived idea that an exemption to the proposed protections be granted to any specific industry.

In 1986 the IBEW supported H.R.1524 until it was amended to exempt the Private Utility Industry.

Our 900,000 IBEW members are employed in many industries and businesses in both the private sector and governmental subdivisions. As an example they work in telephone, construction, manufacturing, electric and gas utilities, radio and TV broadcasting and Cable TV.

We, and many unbiased experts, do not believe any type of polygraph or lie detector is reliable to a degree which justifies mandatory submission to such tests and the high potential for misuse, error, and unjust persecution of loyal, hardworking workers. One example is the exposure of a former CIA employee who spied for the People's Republic of China for 30 years. While employed, the individual passed many lie detector tests. The history of this bogus technology is replete with instances where guilt was overlooked while innocence was prosecuted.

The electric and gas utility industry where some 250,000 IBEW members work, has an extremely low labor turnover. It is not at all unusual for an employee to retire with 35, 40, or 45 years of service with one employer. It is interesting to note that utility employers generally take great pride in loyal, dedicated employees who often times serve in demanding, hazardous occupations requiring great skill and training.

We are sure of the reaction of a long service employee, if he or she were requested to submit to a polygraph test. We believe Secretary of State George Shultz summed it up very well when he made the following remarks about the use of polygraphs, "The minute in this government I am told I an not trusted is the day I leave."

Most employees, our I.B.E.W. members, usually don't have the same economic advantage or option of picking up and leaving as Secretary Shultz. An employee with years of service with one employer is much more restricted. As long as this employee stays with the employer, he or she will always feel they have the stigma of not being trusted.

Our main concern and objection to H.R.1524, the 1986 version of H.R.1212 was the amendment offered by Congressman Broomfield, the "Public Utility Exemption." The Honorable Mr. Broomfield stated: ". . .the electric utilities exercise great caution and care in selecting employees for these sensitive facilities, and the polygraph and similar methods serve as one of the tools they utilize in their checks."

As a result of the Honorable Mr. Broomfield's amendment, the IBEW conducted a survey of the IBEW Local Unions representing employees at 33 large investor-owned utilities in 15 states that do not prohibit the use of polygraphs. Of these 33 companies, 15 companies also have licensed nuclear power plants where the IBEW represents bargaining unit employees. Of the 33 companies we could only find five companies that use polygraph tests. Perhaps there are more involved that we did not uncover, but when you consider the fact that there are 218 Private Electric Utilities in the United States, the number using such unreliable tests has to be small.

The Congressional Record indicates one reason for the "Public Utilities Exemption" was to allow electric utilities the continued use of polygraphs to assure the security of certain segments of an electric utility. The survey the IBEW has conducted does not support this reasoning.

Security, operational integrity, and safety in vital utility systems, is indeed a matter of concern. However, this is nothing new. Historically, utilities have implemented exacting hiring and in-employment policies to assure dependable, trustworthy, and skilled employees. This is a normal function of good management and supervision with which we agree.

At present, 21 States and the District of Columbia have laws restricting the use of polygraph tests. As of December 31, 1986, these States and the District have 34 percent of the total electric generating capacity in the United States. They also have 38 percent of the installed Nuclear Generation in our Nation. The Utilities operating in these States, where polygraph tests are restricted, apparently are operating without any serious security problems by using normal security procedures. We ask, why can't all industries operate in the same efficient manner without resorting to intrusive and unreliable polygraph tests?

In recent years there has been urgent concern about foreign inspired terrorism. This is real and frightening, but actual occurance of such terrorism have been rare to date in our nation. Any connection whatsoever between these problems and the heightened vigilance required to protect industrys would be unjustly and unfairly placed when employees of good record are threatened with oppressive measures.

As to security in nuclear power plants, the Nuclear Regulatory Commission requires an extensive background check and investigation of both utility and contractor employees before an employee is granted an unescorted access permit to the facility. The electric industry, as licensees of the plants, has gone to a great extent in the area of behavioral observaion of employees permitted access to the plants and vital areas. We view this as a good sense approach to security and safety of employees and facilities.

To further enhance the safety of nuclear power plants, Congress on August 27, 1986, approved Public Law 99-399 which added Section 149 to the Atomic Energy Act of 1954. P.L.99-399 authorizes the Nuclear Regulatory Commission to implement a program for the Federal Bureau of Investigation (FBI) to conduct criminal history checks of individuals granted unescorted access to nuclear power facilities by the use of fingerprinting.

The IBEW believes the lie detector has very little, if any, validity, as was pointed out in the 1983 study for the Congressional Office of Technology Assessment (OTA). The study, in part, stated: ". . .there is very little research or scientific evidence to establish polygraph-test validity in screening situations, whether they be pre-employment, pre-clearance, periodic, random or 'dragnet'." If polygraph technology is bad science for the vast majority of situations, it is bad science for the utility industry and all of the industry's workers.

In a 1977 doctoral dissertation, Frank Horwath, a Professor at Michigan State School of Criminal Justice and Director of the American Polygraph Association, found polygraphs only exonerated the innocent in 51 percent of the tests, or one percent more reliable than flipping a coin. We ask this Committee to imagine placing your livelihood, your good reputation, and your future on those odds.

If you are talking about a lie detector test as a tool to intimidate, frighten, and cause workers a long-term resentment against his/her employer, then yes, the polygraph will perform to expectations in employment situations. However, the preponderance of evidence shows that lie detector tests place workers at unwarranted risk of loss of employment and personal reputation.

In conclusion, the IBEW believes good management and in-house security programs can far surpass any type of polygraph test. The submission of workers to lie detector testing is an outrageous violation of personal privacy, and such practices should be prohibited by federal law for all persons.

All employers, whether in the public or private sector, should realize that polygraphs are not a tool that will generate loyal and trustworthy employees. Just the opposite can be the result.

Finally, based on our knowledge of the Electric Utility Industry and what use is made of polygraph tests, the IBEW seriously questions why the Private Utility Industry or any other industry has sought an exemption from Federal legislation banning lie detector tests. Since many employers cannot, by State Law, use such tests and yes, operate safely and securely, we strongly feel that any exemption is unjust and unwarranted. Our dedicated and hardworking IBEW members, along with all other American workers should not be subjected to the extremely questionable validity of polygraph testing.

Since the IBEW feels Lie Detectors have proven to be unreliable and can be used for unjust persecution of employees, we feel their use should be prohibited by all employees in the private sector as well as Federal, State, and Local government. The only possible exception would be an exemption for those employees in the Federal sector involved in sensitive duties such as the FBI, CIA, NSA, etc. The IBEW supports H.R.1212 as introduced on February 24, 1987, with the exception of Section 6 dealing with the exemption for governmental employers as presently written.

Statement of the National Association of Chain Drug Stores, Inc.

BEFORE THE HOUSE COMMITTEE ON EDUCATION AND LABOR

SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES

EMPLOYEE POLYGRAPH PROTECTION ACT (H. R. 1212)

March 17, 1987

NACDS
National Association of Chain Drug Stores, Inc.
P.O. Box 1417-D49
Alexandria, Virginia 22313
703-549-3001

FACT SHEET ON DRUG THEFTS AND DRUG ABUSE
NEED FOR A PHARMACEUTICAL EXEMPTION TO LEGISLATION
BANNING THE USE OF THE POLYGRAPH IN THE WORKPLACE

Employee Theft in Drug Stores - Diversion of Controlled Drugs

1. $480 million in losses are suffered by retail corporate drug stores due to internal theft each year.

2. Employee theft accounts for 60 percent of all losses incurred by the Chain Drug Industry.

3. The Drug Enforcement Administration (DEA) reports that 500,000 to one million dosage units are stolen by employees from retail pharmacies, warehouses and trucks in transit each year. Other DEA registrants including hospitals and nursing homes encounter levels of internal theft.

4. According to DEA from January 1984 to March 1985, there were 8,861 drug thefts in the United States. Of this number, DEA reports that 1,376 or 16 percent were employee thefts.

5. Senator Alan Cranston, in a speech given on January 7, 1986, in San Francisco, stated that more than 130 million dosage units of dangerous, highly abused drugs wind up in illicit channels due to thefts, prescription forgeries and robberies of drug shipments.

Drug Thefts Lead to Increased Drug Abuse - Extent of the Problem

1. 10 million Americans regularly use prescription drugs illicitly. 50 million Americans have used legal drugs illicitly at some point in their lives.

2. The National Institute of Drug Abuse estimates that crime, lost productivity and medical expenses resulting from drug abuse cost the United States $49.6 billion annually. During the debate in the House of Representatives on the 1986 Anti-Drug Abuse Act, Majority Leader Jim Wright (D-Texas) stated that drug trafficking, drug abuse, drug crimes and related problems are draining an estimated $230 billion from the economy of the United States.

3. More Americans die form abusing prescription drugs that from using illegal substances.

4. The medical professions including doctors, nurses and pharmacists have an extremely high rate of drug abuse, higher than any other professional group. The American Nurses Association (ANA) estimates that at least 6 percent of the nation's 1.7 million registered nurses are struggling with chemical dependencies. The American Pharmaceutical Association (APhA) offers special treatment programs for impaired pharmacists. It is estimated that close to 10 percent of the 167,000 practicing pharmacists in the United States have a drug abuse problem. The American Medical Association (AMA) also estimates that one in ten practicing doctors are abusing drugs.

Underlining Need and Desireability for a Pharmaceutical Exemption

1. DEA requires all registrants to maintain a comprehensive employee screening program including the use of polygraph testing (CFR Title 21 Part 1301.90).

2. A pharmaceutical exemption would compliment recently passed laws by the 98th Congress pertaining to drug thefts and diversion. P. L. 98-305 and P. L. 98-473. The 99th Congress enacted the massive Anti-Drug Abuse Act of 1986 allocating a record amount of $3 billion to fight the war against drugs.

4. On March 12, 1986, the House of Representatives adopted the Eckart-Armey amendment allowing for a pharmaceutical exemption prior to final approval of H. R. 1524.

NACDS Position

NACDS and its 171 corporate members operating 18,000 retail drug stores are opposed to H. R. 1212 unless an amendment is incorporated into the legislation that would grant an exemption for companies authorized to manufacture, distribute or dispense controlled substances.

/kar

U.S. Department of Justice

Drug Enforcement Administration

Washington, D.C. 20537

Mr. Ty Kelly
Vice President for Government Affairs
National Association of Chain Drug Stores
P.O. Box 1417-D49
Alexandria, Virginia 22313

Dear Mr. Kelly:

Per your request the following is provided regarding DEA statistics relative to employee drug thefts and previously issued policy regarding the use of polygraph for screening of applicants or employees.

First, regarding employee drug thefts, as relayed to you previously, comprehensive statistics are not available, but the following information should be useful to you:

> For the period from July 1982 thru July 1983, total thefts reported to DEA were 6721. 593, or 9% were reported as "employee thefts." For nine months during this period, a total of 582,893 dosage units (out of a total of 13,614,334 dosage units) were reported as employee thefts, or 4% of the total units reported stolen for nine months.
>
> For the fifteen month period of January 1984 through March 1985, a total of 8,861 drug thefts were reported to DEA, of which 1,376 thefts (16%) were reported as "employee theft." Statistics regarding total dosage units stolen during this period are not available.

Secondly, DEA has previously commented on the use of polygraph examination in the screening of applicants or employees of registrants who will have routine access to controlled substances. DEA regulations concerning employee screening procedures are covered in Title 21, Code of Federal Regulations, Part 1301.90 -1301.93.

It has been DEA's experience that extreme care is necessary on the part of drug firms, both in hiring and monitoring employees who have routine access to controlled substances. These drugs command an illicit price which is many times their legitimate value, thereby, creating an attractive temptation.

Mr. Ty Kelly

The polygraph examination, utilized as one aspect of an employer's comprehensive employee screening, monitoring and investigatory programs, for employees with routine access to controlled substances has proven to be an effective means of determining criminal background, history of drug use, and knowledge of or participation in the diversion of controlled substances. Information obtained as a result of the polygraph examination should be considered as but one part of an overall evaluation of the person's qualifications or continued employment.

DEA supports the use of the polygraph examination for pre-employment screening and as a subsequent investigatory tool in appropriate cases, provided that it is permitted by state and local laws. Those drugs firms which utilize these procedures as part of their comprehensive program to minimize diversion are to be commended.

I hope this information will be useful to you.

Sincerely,

Ronald W. Buzzeo, Deputy Administrator
Office of Diversion Control

INTRODUCTION

THE NATIONAL ASSOCIATION OF CHAIN DRUG STORES, INC., (NACDS) APPRECIATES THE OPPORTUNITY TO PROVIDE WRITTEN TESTIMONY FOR THE RECORD WITH RESPECT TO LEGISLATION (H. R. 1212), ENTITLED THE EMPLOYEE POLYGRAPH PROTECTION ACT. NACDS IS A NON-PROFIT TRADE ORGANIZATION, FOUNDED IN 1933, WHICH REPRESENTS THE MANAGEMENT OF 171 CHAIN DRUG CORPORATIONS THAT ARE OPERATING IN EXCESS OF 18,000 RETAIL DRUG STORES AND PHARMACIES THROUGHOUT THE UNITED STATES. IN ADDITION, OUR CORPORATE MEMBERS OPERATE APPROXIMATELY 73 WAREHOUSE DISTRIBUTION CENTERS AND A FEW CHAIN DRUG MEMBERS ARE ENGAGED IN THE MANUFACTURING OF PHARMACEUTICAL PRODUCTS. THE CHAIN DRUG INDUSTRY PROUDLY EMPLOYS CLOSE TO HALF A MILLION PEOPLE IN VARIOUS CAPACITIES WHO WORK IN CORPORATE HEADQUARTERS, REGIONAL OFFICES, WAREHOUSING FACILITIES AND IN RETAIL DRUG STORES. COLLECTIVELY, NACDS MEMBERS WERE RESPONSIBLE FOR $28 BILLION IN RETAIL SALES IN 1986 AND MORE THAN 540 MILLION PRESCRIPTIONS WERE DISPENSED TO PATIENTS BY CORPORATE DRUG CHAINS DURING THIS SAME PERIOD. AN ESTIMATED 48,000 PHARMACISTS ARE CURRENTLY WORKING FOR OUR MEMBER COMPANIES.

MEMBERS OF THE NATIONAL ASSOCIATION OF CHAIN DRUG STORES RANGE IN SIZE FROM OPERATIONS WITH ONLY FOUR STORES TO COMPANIES WITH MORE THAN 1900 RETAIL OUTLETS. THUS, OUR TESTIMONY REFLECTS THE VIEWS OF BOTH SMALL BUSINESSES AND LARGE CORPORATE ENTITIES. NACDS DEEPLY APPRECIATES THE OPPORTUNITY TO PARTICIPATE IN THESE HEARINGS AND TO DISCUSS WITH THE SUBCOMMITTEE OUR CONCERNS REGARDING H. R. 1212 WHICH WOULD PROHIBIT THE USE OF THE POLYGRAPH TEST FOR EMPLOYMENT PURPOSES IN THE PRIVATE SECTOR.

DURING THE 99th CONGRESS, WE TESTIFIED BEFORE THE SUBCOMMITTEE ON A SIMILAR PROPOSAL AND FILED A STATEMENT WITH THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES WHICH WAS CONSIDERING A COMPANION MEASURE (S. 1815). THE PRIMARY FOCUS OF OUR STATEMENTS WAS TWO-FOLD. WE WANTED TO ADVISE THE CONGRESS OF OUR COMMITMENT TO WORK TOWARD FASHIONING A MEANINGFUL PIECE OF THE LEGISLATION THAT WOULD PRESERVE AN INDIVIDUAL'S RIGHT TO PRIVACY, AND THE RIGHT OF THE WORKER TO SEEK FAIR REMEDIES WHILE AT THE SAME TIME PROVIDING A CAREFUL BALANCE SO THAT A BUSINESS CAN PROTECT ITSELF FROM CRIME AND THEFT. SECONDLY, NACDS ATTEMPTED TO DOCUMENT FOR THE CONGRESS THE EXTENT OF THE PROBLEM OF INTERNAL THEFT WITHIN OUR INDUSTRY AND HOW OUR CORPORATE MEMBERS ARE WORKING TO KEEP THESE SHORTAGES TO A MINIMUM.

NACDS PRIMARY CONCERN - DRUG SECURITY

WHILE THE PROBLEM OF EMPLOYEE THEFT AGAINST BUSINESS AND RETAILING IS SUBSTANTIAL, EXACTING A TOLL OF SOME $40 BILLION A YEAR IN LOSSES, IT IS THE MORE SENSITIVE ISSUE OF DRUG THEFT THAT NACDS ONCE AGAIN WISHES TO ADDRESS IN RELATIONSHIP TO THE PENDING LEGISLATION. THEREFORE, OUR STATEMENT WILL CONCENTRATE ON THE UNDERLINING NEED TO PROVIDE FOR A FAIR AND REASONABLE EXEMPTION FOR THOSE COMPANIES THAT ARE AUTHORIZED BY THE FEDERAL GOVERNMENT TO MANUFACTURE, DISTRIBUTE OR DISPENSE CONTROLLED SUBSTANCES.

MORE SPECIFICALLY, WE ARE ASKING THE CONGRESS TO GRANT OUR INDUSTRY A MODEST BUT CRITICALLY IMPORTANT EXCLUSION SO THAT THE TIGHTEST POSSIBLE SECURITY MEASURES WHICH INCLUDE THE POLYGRAPH, THE WRITTEN INTEGRITY TEST

AND OTHER PROCEDURES CAN CONTINUE TO BE UTILIZED FOR THE PURPOSE OF MINIMIZING DRUG LOSSES. IN OUR VIEW, THE PHARMACEUTICAL COMMUNITY, BY THE VERY NATURE OF ITS BUSINESS, MUST BE HELD ACCOUNTABLE TO THE HIGHEST STANDARD OF PUBLIC TRUST. EVERY PRECAUTION SHOULD BE AND MUST BE EXERCISED TO ENSURE THE SAFETY, INTEGRITY AND SECURITY OF THE POTENT MEDICATIONS THAT WE MAKE, DISTRIBUTE AND SELL TO PATIENTS. WHILE SOME EXPERTS AND WITNESSES HAVE ARGUED THAT GOOD MANAGEMENT TECHNIQUES AND COMPANY POLICY CAN EFFECTIVELY REDUCE INTERNAL THEFT NEGATING THE NEED FOR THE POLYGRAPH, NACDS IS OF THE OPINION THAT TEMPTATIONS INVOLVING CONTROLLED DRUGS NECESSITATE THAT ADDITIONAL PRECAUTIONS MUST BE MAINTAINED, NAMELY THE AVAILABILITY OF THE POLYGRAPH.

MAGNITUDE OF DRUG THEFTS FROM RETAIL PHARMACIES-WAREHOUSES-DEA REGISTRANTS

THE DRUG ENFORCEMENT ADMINISTRATION (DEA) ESTIMATES THAT EMPLOYEES ARE STEALING BETWEEN 500,000 TO MORE THAN ONE MILLION DOSAGE UNITS OF DANGEROUS DRUGS EACH YEAR FROM RETAIL PHARMACIES, WAREHOUSING FACILITIES, DISTRIBUTION CENTERS AND TRUCKS IN TRANSIT. OTHER DEA REGISTRANTS INCLUDING HOSPITALS, NURSING HOMES AND OTHER HEALTH CARE FACILITIES ARE LOSING SIMILAR AMOUNTS OF DRUGS DUE TO EMPLOYEE THEFT. THE DEA HAS STATED THAT DRUG THEFTS ARE BEING COMMITTED AT THE RATE OF ABOUT ONE PER HOUR EVERY DAY IN THE UNITED STATES AND THAT 16 PERCENT OF THOSE THEFTS ARE COMMITTED BY EMPLOYEES IN THE RETAIL AREA. SENATOR ALAN CRANSTON (D-CALIF.) IN A SPEECH DELIVERED IN EARLY 1986 STATED THAT 130 MILLION DOSAGE UNITS OF DANGEROUS MEDICATIONS ARE BEING DIVERTED FROM LEGITIMATE BUSINESSES TO STREET TRAFFICKERS FOR PROFIT. THE PRICE THAT A CONTROLLED DRUG CAN COMMAND ON THE STREET IS ASTRONOMICAL IN COMPARISON TO ITS RETAIL PRICE. MEDICATIONS THAT WILL

SELL LEGALLY FOR 25 TO 40 CENTS PER TABLET OR PILL WITH AN AUTHORIZED PRESCRIPTION IN A PHARMACY CAN COMMAND A STREET PRICE OF $25 TO $50 PER TABLET. DILAUDID WILL EASILY GO FOR $40 A PILL. OTHER TOP DRUGS OF CHOICE FOR ABUSE, THEFT, AND TRAFFICKING INCLUDE CODEINE, RITALIN, PRELUDIN, PERCODAN, DEMEROL, DEXADRIN, AND VALIUM. THUS, JUST ONE BOTTLE OF 100 OF ANY OF THE ABOVE MEDICATIONS IS WORTH ROUGHLY $3,000 TO $4,000 OR MORE IN ILLICIT CHANNELS. THE QUICK MONEY THAT CAN BE REALIZED FROM THE THEFT OF THESE PRODUCTS IS READILY APPARENT, MAKING EVEN THE MOST TRUSTED EMPLOYEE SUSPECTIBLE TO CONTEMPLATING THEFT.

HOW ARE DRUGS STOLEN? THE THEFT OF CONTROLLED SUBSTANCES CAN TAKE MANY FORMS. DANGEROUS DRUGS ARE DIVERTED FROM LEGITIMATE AREAS INTO ILLICIT CHANNELS THROUGH FORGED AND STOLEN PRESCRIPTION PADS. PHARMACISTS MIGHT "SHORT COUNT" A PRESCRIPTION BY DISPENSING 28 PILLS WHEN 30 UNITS WERE SUPPOSED TO BE PROVIDED TO THE PATIENT. BOTTLES AND CONTAINERS OF DRUGS DISAPPEAR FROM STOCK AND INVENTORY SINCE NOT ALL CONTROLLED SUBSTANCES ARE KEPT UNDER LOCK AND KEY. RECORDS AND COMPUTER INFORMATION MAY BE MANIPULATED TO HIDE A THEFT AS PRODUCTS MOVE THROUGH THE DISTRIBUTION SYSTEM. DRUGS ARE ALSO LOST OR STOLEN IN TRANSIT AND AT THE TIME OF DELIVERY. DESPITE ALL THE SAFEGUARDS THAT HAVE BEEN PUT IN PLACE, THE LOSS OF CONTROLLED DRUGS CONTINUES TO BE A PROBLEM TO ALL COMPANIES THAT HANDLE THESE POTENT MEDICATIONS.

AS THE SUBCOMMITTEE KNOWS, DRUG ABUSE HAS BECOME A FRIGHTENING NATIONAL EPIDEMIC WITH VIRTUALLY NO PREFERENCE TO AGE, SEX, RACE, RELIGION OR ECONOMIC BACKGROUND. IT IS ESTIMATED THAT AT LEAST 10 MILLION AMERICANS

REGULARLY USE PRESCRIPTION DRUGS ILLICITLY AND THAT FIVE TIMES THAT MANY PEOPLE HAVE USED PRESCRIPTION DRUGS ILLICITLY AT SOME POINT IN THIER LIVES. IT IS INDEED A SAD COMMENTARY, BUT MORE PEOPLE DIE FROM ABUSING PRESCRIPTION DRUGS THAN FROM USING ILLEGALLY PRODUCED HARD DRUGS.

THE NATIONAL INSTITUTE OF DRUG ABUSE (NIDA) ESTIMATES THAT CRIME, LOST PRODUCTIVITY AND MEDICAL EXPENSES RESULTING FROM DRUG ABUSE, COSTS OF NATION $49.6 BILLION ANNUALLY. DURING THE DEBATE IN THE HOUSE OF REPRESENTATIVES ON THE 1986 OMNIBUS ANTI-DRUG ABUSE ACT, MAJORITY LEADER JIM WRIGHT (D-TEXAS) STATED THAT DRUG TRAFFICKING, DRUG ABUSE, DRUG CRIMES, LAW ENFORCEMENT, AND THE WHOLE GAMUT OF RELATED PROBLEMS DRAIN $230 BILLION FROM THE ECONOMY OF THE UNITED STATES EVERY YEAR. IN THE AUTOMOBILE INDUSTRY, EXPERTS CALCULATE THAT DRUG ABUSE IN TERMS OF LOST PRODUCTIVITY, UNRELIABLE WORKMANSHIP, CRIME AND DISABILITY ADDS AN ADDITIONAL $350 TO THE COST OF EACH AUTOMOBILE THAT IS BUILT IN THE UNITED STATES. IN FACT IN THE STATE OF MICHIGAN WHERE THE USE OF THE POLYGRAPH HAS BEEN GREATLY CURTAILED, PER CAPITA CONSUMPTION OF A VARIETY OF SCHEDULE II PRESCRIPTION DRUGS IS AMONG THE HIGHEST IN THE NATION. THESE STATISTICS CAN BE DIRECTLY TRACED TO PHYSICIANS AND PHARMACISTS WHO CATER TO PATIENTS THAT ABUSE DRUGS. DIVERSION AND THEFT ARE ALSO CONTRIBUTING FACTORS TO MICHIGAN'S HIGH RATE OF USAGE OF SCHEDULE II SUBSTANCES.

WHAT IS THE IMPACT ON THE MEDICAL COMMUNITY? BESIDE HIGHER MEDICAL BILLS TO TREAT PEOPLE THAT HAVE FALLEN VICTIM TO DRUG ABUSE, HEALTH CARE PROFESSIONS ARE MORE VULNERABLE TO CHEMICAL DEPENDENCY THAN ANY OTHER PROFESSIONAL GROUP. THE AMERICAN NURSES ASSOCIATION (ANA) ESTIMATES THAT AT LEAST 6 PERCENT OF THE NATION'S 1.7 MILLION REGISTERED NURSES ARE

STRUGGLING WITH CHEMICAL DEPENDENCIES. THE AMERICAN PHARMACEUTICAL ASSOCIATION (APhA) OFFERS SPECIAL TREATMENT PROGRAMS FOR IMPAIRED PHARMACISTS. IT IS ESTIMATED THAT CLOSE TO 10 PERCENT OF THE 167,000 PRACTICING PHARMACISTS IN THE UNITED STATES HAVE A DRUG ABUSE PROBLEM. THE AMERICAN MEDICAL ASSOCIATION (AMA) SHOWS SIMILAR STATISTICS THAT ONE IN TEN PHYSICIANS ARE ABUSING DRUGS. THE REASONS THAT THESE HEALTH CARE PROFESSIONALS HAVE A HIGHER ABUSE RATE THAT OTHER PROFESSIONAL GROUPS IS BECAUSE THEY HAVE EASY ACCESS TO NARCOTIC AND PSYCHOTROPHIC DRUGS IN THEIR WORK.

IT IS VERY DIFFICULT FOR OUR INDUSTRY TO ADMIT THAT WE HAVE THESE PROBLEMS OF THEFT AND DRUG ABUSE, BUT OUR INDUSTRY IS NOT UNIQUE. INTERNAL THEFT IS AFFECTING ALL SECTORS OF THE ECONOMY FROM WALL STREET TO MAIN STREET, WHILE DRUG ABUSE HAS BECOME A MAJOR PROBLEM IN THE WORKPLACE AND IN THE COMMUNITY. IT CAUSES HARDSHIP TO BOTH FAMILIES AND BUSINESSES. IN THE WORKPLACE, DRUG ABUSE RESULTS IN EXCESSIVE ABSENTEEISM, POOR JOB PERFORMANCE, MORE ACCIDENTS AND INJURIES. FURTHERMORE, THERE IS MOUNTING EVIDENCE LINKING DRUG ABUSE AND CRIME. A RECENT SURVEY OF INMATES IN STATE PRISONS ACROSS THE COUNTRY FOUND THAT ONE-THIRD OF THE PRISONERS WERE UNDER THE INFLUENCE OF DRUGS AT THE TIME OF THEIR OFFENSE. AND WE ALL KNOW TOO WELL HOW DRUG ABUSE DESTROYS A FAMILY.

WE IN THE CHAIN DRUG INDUSTRY ARE DEEPLY CONCERNED ABOUT THE TERRIBLE HUMAN SUFFERING THAT RESULTS FROM THE ABUSE OF PRESCRIPTION DRUGS AND THE USE OF ILLEGAL SUBSTANCES. THROUGHOUT THE YEARS, NACDS AND OUR

CORPORATE MEMBERS HAVE WORKED DILIGENTLY WITH FEDERAL AND STATE GOVERNMENTAL LAW ENFORCMENT AGENCIES TOWARD ESTABLISHING ADEQUATE SAFEGUARDS FOR PRESCRIPTION DRUGS, ESPECIALLY CONTROLLED SUBSTANCES. THE CHAIN DRUG INDUSTRY HAS MADE SUBSTANTIAL INVESTMENTS TO STRENGTHEN THE SECURITY OF AREAS WHERE CONTROLLED SUBSTANCES ARE STORED. AND OUR CORPORATE MEMBERS MAKE EVERY EFFORT TO CARRY OUR A CAREFUL AND EXTENSIVE SCREENING PROGRAM TO IDENTIFY POTENTIAL SECURITY RISKS AMONG THOSE INDIVIDUALS WHO ARE APPLYING FOR POSITIONS THAT WOULD MEAN THEY WILL BE WORKING IN AND AROUND AREAS WHERE NARCOTICS ARE KEPT. IN SOME INSTANCES, THE POLYGRAPH IS AN INTEGRAL PART OF THIS PRE-EMPLOYMENT PROCESS. OTHER NACDS CORPORATE MEMBERS MAY INFREQUENTLY UTILIZE THE POLYGRAPH BUT WILL RELY MORE ON WRITTEN INTEGRITY TESTS. IN AN OVERWHELMING NUMBER OF OUR COMPANIES, WE HAVE FOUND THAT OUR MEMBERS FEEL STRONGLY THAT THE POLYGRAPH AND THE WRITTEN INTEGRITY TEST ARE INDISPENSIBLE. THEY SUPPLEMENT TO A GREAT DEGREE OTHER SCREENING PROCEDURES SUCH AS EMPLOYMENT APPLICATIONS, PERSONAL REFERENCES, CRIMINAL BACKGROUND CHECKS, AND THE INTERVIEW PROCESS. IRONICALLY, CRIMINAL BACKGROUND CHECKS TO DETERMINE IF AN INDIVIDUAL HAS BEEN ARRESTED AND CONVICTED OF A DRUG CRIME ARE EXTREMELY USEFUL, BUT OFTEN THIS INFORMATION IS NOT AVAILABLE TO OUR MEMBER COMPANIES.

DEA SUPPORTS POLYGRAPH USE

BANNING THE USE OF THE POLYGRAPH EXAMINATIONS, IN OUR OPINION, WOULD DEPRIVE THE RETAIL DRUG STORE INDUSTRY, BOTH CHAIN AND INDEPENDENT, AS WELL AS WHOLESALERS AND MANUFACTURING COMPANIES, AN IMPORTANT WEAPON IN OUR BATTLE

AGAINST THE THEFT AND ABUSE OF LEGITIMATE DRUGS. BANNING THE POLYGRAPH IN THE PHARMACEUTICAL INDUSTRY WOULD ALSO GREATLY UNDERMINE THE FEDERAL GOVERNMENT'S ONGOING CAMPAIGN AGAINST ILLICIT DRUG TRAFFICKING AND DRUG ABUSE.

IN FACT, THE FEDERAL GOVERNMENT AGREES. THE DRUG ENFORCEMENT ADMINISTRATION (DEA) STRONGLY SUPPORTS THE CONTINUED USE OF POLYGRAPH TESTING BY FIRMS THAT HANDLE CONTROLLED SUBSTANCES. A RECENT LETTER FROM THE DEA TO NACDS REFLECTING THIS POSITION IS ATTACHED TO OUR TESTIMONY. AS AN INDUSTRY THAT IS LICENSED AND REGISTERED BY THE DEA, IT MUST BE NOTED THAT OUR MEMBERS ARE HELD ACCOUNTABLE FOR EACH AND EVERY UNIT DOSE OF DANGEROUS DRUGS THAT IS EITHER LOST OR STOLEN FROM OUR MEMBERS' STORES AND DISTRIBUTION CENTERS. IF LOSSES EXCEED ACCEPTABLE LEVELS, DEA HAS THE AUTHORITY TO REVOKE LICENSES AND WE ARE OUT OF BUSINESS. THIS MEANS WE ARE PROHIBITED FROM CARRYING AND DISPENSING THESE POWERFUL MEDICATIONS TO TREAT ILLNESSES AND DISEASE, WHICH IS ONE OF THE MOST IMPORTANT FUNCTIONS OF THE PHARMACY. NACDS DOES NOT BELIEVE THAT THE CONGRESS WOULD WANT THIS UNINTENDED CONSEQUENCE IF THE PENDING LEGISLATION WERE ENACTED INTO LAW WITHOUT A PHARMACEUTICAL EXEMPTION.

OTHER MAJOR ORGANIZATIONS ARE ALSO VOICING THEIR CONCERNS OVER THE IMPACT OF FEDERAL LEGISLATION TO OUTLAW POLYGRAPH TESTING. THE NATIONAL FEDERATION OF PARENTS FOR DRUG-FREE YOUTH (NFP) IS ON RECORD IN SUPPORT OF THE NEED TO PROVIDE AN EXEMPTION FOR OUR INDUSTRY.

ACCORDING TO THE NATIONAL INSTITUTE ON DRUG ABUSE (NIDA), AS MANY AS SIX MILLION WORKERS IN THE UNITED STATES REGULARLY ABUSE DRUGS ON THE JOB. EXPERTS HAVE FURTHER ESTABLISHED 19 TO 36 YEARS OF AGE AS THE MEDIAN AGE RANGE OF EMPLOYEES UNDER THE INFLUENCE OF DRUGS. THESE ARE FRIGHTENING STATISTICS, ESPECIALLY FOR OUR INDUSTRY WHICH IS RETAIL AND HIRES MOSTLY YOUNG PEOPLE.

ASIDE FROM MAINTAINING A COMPREHENSIVE SCREENING AND INVESTIGATIVE PROGRAM TO KEEP DRUG LOSSES AT AN ABSOLUTE MINIMUM, WHAT OTHER STEPS ARE OUR MEMBERS TAKING TO ENSURE THE HEALTH AND SAFETY OF ITS WORKFORCE? CORPORATE DRUG CHAINS HAVE INITIATED STEPS TO INSURE THAT ONLY THOSE EMPLOYEES WHO ARE THE MOST TRUSTWORTHY ARE GIVEN JOBS THAT COULD IMPACT UPON THE WELFARE OF THE AMERICAN PUBLIC. OUR MEMBERS HAVE ALSO INSTITUTED EMPLOYEE ASSISTANCE PROGRAMS (EAP) TO HELP WORKERS WHO ARE ABUSING DRUGS AND ALCOHOL. DRUG CHAIN MANAGEMENT ENCOURAGES WORKERS TO ADVISE THEM ON A CONFIDENTIAL BASIS IF THEY SUSPECT THAT ONE OF THEIR FELLOW EMPLOYEES IS USING DRUGS ILLICITLY SO THAT HELP CAN BE OFFERED AS QUICKLY AS POSSIBLE. OUR MEMBERS, LIKE OTHER BUSINESSES INVOLVED IN HEALTH CARE, ARE REACHING OUT TO HELP IMPAIRED PERSONNEL. BUT BY THE SAME TOKEN, OUR INDUSTRY UNANIMOUSLY BELIEVES THESE ACTIVITIES ARE ONLY A PARTIAL SOLUTION TO THE PROBLEM AT HAND UNLESS THE AVAILABILITY OF THE POLYGRAPH CAN CONTINUE IN THE PHARMACEUTICAL AREA.

DRUG EXEMPTION WOULD COMPLIMENT LAWS PASSED BY 98th AND 99th CONGRESS

PROVIDING AN EXEMPTION FOR THE PHARMACEUTICAL INDUSTRY CLEARLY COMPLIMENTS OTHER LEGISLATION THAT THE CONGRESS HAS ENACTED INTO LAW TO MINIMIZE THE

THEFT AND DIVERSION OF DANGEROUS DRUGS. DURING THE 98th CONGRESS, THE CONTROLLED SUBSTANCE REGISTRANT PROTECTION ACT OF 1984 (P. L. 98-305) WAS APPROVED. THIS LANDMARK PIECE OF LEGISLATION MADE, FOR THE FIRST TIME, CERTAIN TYPES OF ARMED ROBBERIES AND BURGLARIES OF RETAIL PHARMACIES, WAREHOUSES AND FROM OTHER REGISTRANTS TO OBTAIN CONTROLLED SUBSTANCES A FEDERAL CRIME. IN ESSENCE, CONGRESS FOUND IT NECESSARY TO PASS A LAW TO PROTECT DRUG STORES FROM THE GROWING NUMBER OF VIOLENT CRIMES INVOLVING THE THEFT OF DRUGS BY FORCE. THAT SAME YEAR, FEDERAL LAWMAKERS ALSO APPROVED THE DIVERSION CONTROL AMENDMENTS AS PART OF THE COMPREHENSIVE CRIME CONTROL ACT OF 1984 (P. L. 98-473). THE PURPOSE OF THIS STATUTE IS TO PROVIDE FOR MORE EXTENSIVE ACCOUNTABILITY AND RECORDKEEPING AMONG PRACTITIONERS THAT PRESCRIBE, ADMINISTER AND DISPENSE CONTROLLED SUBSTANCES IN THE LAWFUL COURSE OF THEIR PROFESSIONAL PRACTICE. IN BRIEF, THE CONGRESS FAVORED STRONGER CONTROL OVER PHYSICIANS SIMILAR TO THOSE ALREADY IN PLACE FOR DRUG STORES AND WAREHOUSES SO THAT POTENT SUBSTANCES COULD BE TRACED AT THE PRACTITIONER LEVEL.

THE MOST SIGNIFICANT DRUG LEGISLATION IN THIS AREA TO BE ENACTED INTO LAW BY THE 99th CONGRESS WAS THE ANTI-DRUG ABUSE ACT OF 1986. AMONG OTHER THINGS, THIS LANDMARK LAW NEARLY DOUBLES THE AMOUNT OF FEDERAL FUNDING FOR THE WAR ON NARCOTICS TO A RECORD AMOUNT OF $3 BILLION. AS PART OF THIS INCREASED ALLOCATION OF FUNDS IN THE DRUG ABUSE AREA, THE BUDGET OF THE DRUG ENFORCMENT ADMINISTRATION (DEA) HAS ALSO BEEN MEASUREABLY INCREASED FROM $490 MILLION TO $522 MILLION. NACDS BELIEVES THAT THESE FUNDING INCREASES ARE ABSOLUTELY NECESSARY, AND WE WILL HELP TO COMPLIMENT OUR EFFORTS TO CURTAIL THE THEFT AND DIVERSION OF LEGITIMATE DRUGS.

TO THIS END, WE BELIEVE THAT AN AMENDMENT TO H. R. 1212 EXEMPTING THE PHARMACEUTICAL INDUSTRY WOULD BE CONSISTENT WITH THE ON-GOING LEGISLATIVE APPROACH THAT THE CONGRESS HAS BEEN TAKING ON DRUG ISSUES. SUCH AN EXCLUSION WAS ADOPTED WITHOUT DISSENT BY THE HOUSE OF REPRESENTATIVES IN 1986 DURING CONSIDERATION OF A SIMILAR BILL TO RESTRICT POLYGRAPH TESTING.

ECKART-ARMEY PHARMACEUTICAL EXEMPTION

IN REVIEW, THE PHARMACEUTICAL AMENDMENT OFFERED LAST SESSION BY REP. DENNIS ECKART (D-OHIO) AND REP. RICHARD ARMEY (R-TEXAS) REFLECTS A MOST SENSIBLE AND PRUDENT ACCOMMODATION FOR THE CONTINUING AVAILABILTIY OF THE POLYGRAPH FOR THE DRUG INDUSTRY. THE AMENDMENT ALLOWS FOR, BUT DOES NOT MANDATE, POLYGRAPH TESTING. IT WOULD PERMIT RETAIL DRUG STORES TO CAREFULLY PRE-SCREEN APPLICANTS IN ORDER TO ASCERTAIN IF THESE INDIVIDUALS HAVE A DRUG ABUSE PROBLEM AND FOR INVESTIGATIVE PURPOSES CONCERNING SHORTAGES OF DRUGS. IN THE HOUSE PROVISION AS ADOPTED, CERTAIN SAFEGUARDS AND PARAMETERS WERE ESTABLISHED. THE AMENDMENT WOULD NOT PRE-EMPT EXISTING STATE LAWS THAT EXPLICITLY OR IMPLICITLY LIMIT OR PROHIBIT THE USE OF LIE DETECTOR TESTS AND ANY NEGOTIATED COLLECTIVE BARGAINING AGREEMENTS. FINALLY, AND VERY IMPORTANT, IS THAT THE ECKART-ARMEY AMENDMENT CLEARLY STATES THAT THE RESULTS OF THE POLYGRAPH CANNOT BE USED AS THE SOLE BASIS FOR A BUSINESS TO DECIDE WHETHER TO FIRE AN EMPLOYEE OR NOT HIRE AN APPLICANT. NACDS BELIEVES THAT THE RESULTS OF POLYGRAPH TESTS SHOULD NEVER BE THE SOLE DETERMINING FACTOR IN SCREENING APPLICANTS OR IN TERMS OF AN INVESTIGATION.

MR. CHAIRMAN, NACDS WISHES TO ENDORSE THE HOUSE APPROVED PHARMACEUTICAL EXEMPTION AS WAS CONTAINED IN H. R. 1524 AND WE URGE THAT IT BE INCORPORATED INTO THE NEW BILL (H. R. 1212). IN APPROVING THIS CRITICALLY IMPORTANT AMENDMENT, THE HOUSE OF REPRESENTATIVES STIPULATED THAT THE POLYGRAPH COULD ONLY BE GIVEN TO PROSPECTIVE EMPLOYEES AND CURRENT EMPLOYEES HAVING "DIRECT ACCESS" TO THE MANUFACTURE, STORAGE, DISTRIBUTION OR SALE OF CONTROLLED SUBSTANCES. WHILE THE TERM OR PHRASE "DIRECT ACCESS" WOULD BE INVALUABLE IN PREVENTING OR INVESTIGATING MOST DRUG THEFTS, WE BELIEVE THAT THE TERM "DIRECT" NEEDS TO BE CHANGED TO "REASONABLE" ACCESS. WITH THIS MINOR BUT IMPORTANT REVISION, THE AMENDMENT WOULD ALLOW FOR NECESSARY SAFEGUARDS TO COMBAT SITUATIONS OF CONSPIRACY OR COLLABORATION WITHIN A STORE OR DISTRIBUTION CENTER INVOLVING THE THEFT OF DRUGS.

FOR EXAMPLE, WITH THE ADVENT OF COMPUTERS BEING UTILIZED EXTENSIVELY AT CORPORATE HEADQUARTERS AND IN WAREHOUSING FACILITIES COUPLED WITH THE USE OF COMPUTER TERMINALS IN PHARMACY DEPARTMENTS AT THE STORE LEVEL, NACDS IS VERY WORRIED ABOUT THE MANIPULATION OF RECORDS BY INDIVIDUALS FAR REMOVED FROM AREAS WHERE CONTROLLED SUBSTANCES ARE KEPT WHEREBY MORE SOPHISTICATED FORMS OF DRUG THEFTS COULD GO UNDETECTED. MANY OF OUR CORPORATE MEMBERS THAT HAVE COMPUTER SYSTEMS IN PLACE HAVE ADVISED NACDS OF THEIR CONCERN REGARDING THE FALSIFICATION OF RECORDS AND INFORMATION THAT HELP TRACK AND ACCOUNT FOR THE MOVEMENT OF DANGEROUS DRUGS WITHIN THE COMPANY.

THUS, WE FIRMLY BELIEVE THAT IN ORDER TO PROVIDE FOR ADEQUATE PROTECTION TO DEAL WITH POTENTIAL PROBLEMS OF CONSPIRACY INVOLVING RECORDKEEPING

AND THE ALTERATION OF INFORMATION TO HIDE A DRUG THEFT, THE AMENDMENT SHOULD COVER THESE SITUATIONS. WE URGE THE SUBCOMMITTEE TO CAREFULLY CONSIDER AN AMENDMENT FOR A PHARMACEUTICAL EXEMPTION AND TO CHANGE THE WORK "DIRECT" TO "REASONABLE" REGARDING ACCESS TO CONTROLLED SUBSTANCES.

POLYGRAPH TESTS ARE USED EXTENSIVELY BUT PRUDENTLY THROUGHOUT THE CHAIN DRUG INDUSTRY. NACDS SURVEYED OUR MEMBERS AND FOUND THAT 80 PERCENT OF THE RESPONDING COMPANIES USE THIS INVESTIGATIVE DEVICE. FURTHER, WE LEARNED FROM OUR SURVEY THAT OF THOSE COMPANIES UTILIZING THE POLYGRAPH MORE THAN 90 PERCENT CONSIDER THE TEST TO BE ESSENTIAL AND THAT A MAJORITY EXPERIENCED A DECLINE IN INTERNAL THEFTS AFTER BEGINNING A SECURITY PROGRAM THAT INCLUDED THE USE OF THE POLYGRAPH. FINALLY, IT SHOULD BE NOTED THAT A SUBSTANTIAL NUMBER OF OUR CORPORATE MEMBERS WILL ONLY USE THE POLYGRAPH AS A LAST RESORT IF ALL OTHER PROCEDURES FAIL TO UNCOVER THE INDIVIDUAL OR INDIVIDUALS RESPONSIBLE FOR A THEFT.

TO THIS END, IN EXPRESSING OUR SUPPORT AND ENDORSEMENT FOR THE PHARMACEUTICAL AMENDMENT, NACDS BELIEVES VERY SINCERELY THAT THE AVAILABILITY RATHER THAN THE ACTUAL USE OF THE POLYGRAPH CAN SERVE AS A VERY STRONG DETERENT TO DRUG THEFTS.

ARE THERE STATISTICS AVAILABLE THAT DEMONSTRATE CLEARLY THAT THE USE OF POLYGRAPH TESTING HAS RESULTED IN REDUCED CRIME RATES? OBVIOUSLY, A CLEAR DEMONSTRATION OF THIS TYPE IS IMPOSSIBLE. ONE WOULD BE HARD PRESSED TO PROVE WHY A CRIME HAS NOT BEEN COMMITTED. HOWEVER, FROM VERY SKETCHY DATA ONE MAY ARGUE THAT THERE IS A CORRELATION BETWEEN CRIME RATES AND POLYGRAPH TESTING. NATURALLY, THOSE WHO OPPOSE THE USE OF LIE DETECTORS

WILL CONTEND THAT SUCH CORRELATIONS ARE INVALID. NEVERTHELESS, CONSIDER THESE DATA: ONE CORPORATE DRUG CHAIN BY USING THE POLYGRAPH ALONG WITH OTHER SECURITY PROCEDURES, REFERENCE CHECKS, AND INTEGRITY TESTING REDUCED LOSSES OF PROFIT FROM 4 PERCENT TO 1.5 PERCENT IN LESS THAN THREE YEARS. ANOTHER CORPORATE DRUG CHAIN SUSPENDED POLYGRAPH TESTING IN ITS BALTIMORE FACILITIES. INTERNAL THEFT BEGAN TO INCREASE UNTIL THE POLYGRAPH POLICY WAS REINSTATED.

CONCLUSION

NACDS, THEREFORE, URGES THE SUBCOMMITTEE TO ADOPT A PHARMACEUTICAL AMENDMENT REFLECTIVE OF THE ECKART-ARMEY LANGUAGE AS APPROVED BY THE HOUSE OF REPRESENTATIVES DURING 1986 WITH THE SLIGHT MODIFICATIONS THAT WE HAVE OUTLINED. IF SUCH A PROVISION IS INCORPORATED INTO H. R. 1212 WE WILL BE ABLE TO BETTER GUARANTEE THE SAFETY, INTEGRITY AND SECURITY OF THE MANY PRESCRIPTION DRUG PRODUCTS AND CONTROLLED SUBSTANCES THAT OUR CORPORATE MEMBERS MAKE, TRANSPORT, STOCK AND DISPENSE TO PATIENTS. FINALLY, WE ASK FOR CLARIFICATION THAT THE LEGISLATION IS NOT INTENDED TO BAN OR RESTRICT THE USE OF WRITTEN INTEGRITY TESTS. THESE WRITTEN TESTING PROCEDURES ARE VERY IMPORTANT TO THE CHAIN DRUG INDUSTRY'S OVERALL SECURITY PROGRAM.

THANK YOU FOR THE OPPORTUNITY TO PROVIDE THIS TESTIMONY FOR THE RECORD. NACDS TRUSTS THAT OUR STATEMENT WILL BE GIVEN FULL AND CAREFUL CONSIDERATION.

/kar

Att: Matthew G. Martinez, Chairman

April 30, 1987
Hearing Rm. 2261, Rayburn

U.S. House of Representatives
Committee on Education & Labor
Subcommittee on Employment Opportunities
2181 Rayburn Office Building
Washington, D.C. 20515

Statement of the National Association of Showroom Merchandisers (NACSM) in Opposition to H.R. 1212, and in Support of H.R. 1536

The National Association of Catalog Showroom Merchandisers ("NACSM"), is a trade association representing approximately 2,000 discount retail stores with billions of dollars in annual sales, and respectfully requests that this statement be included in the public record.

NACSM supports H.R. 1536 a bill to regulate the use of polyugraph examinations for employment purposes, and opposes H.R. 1212, which would impose an outright ban on such tests for all industry.

Catalog showrooms, as discount retailers, sell billions of dollars of high priced jewelry which is highly susceptible to theft.

A just released study by Arthur Young & Co. shows that forty two percent (42%) of product loss is from employee theft. A major factor in the success of the catalog showroom industry in generally keeping inventory shrinkage to less than one percent (1%) of sales has been the controlled use of polygraph examinations.

We strongly support a bill to regulate and control the use of polygraph examinations. However, the outright prohibition of the use of polygraph would have serious adverse consequences for our entire society.

There are a wide array of industries that utilize polygraph. The jewelry industry has staggering potential losses at stake, which is why virtually every trade association representing the jewelry industry opposes H.R. 1212. In addition to the hundreds of millions of dollars of potential jewelry thefts at stake, there are other serious issues of public safety and crime control. For example, the airlines and trucking industries are presently having serious problems with the unlawful transportation of illicit drugs. The pharmaceutical industry has similar problems with the theft of such drugs. The security and nursing and day care industries have other obvious safety problems. Staggering potential losses also exist for the securities and banking industries.

Nursing and child day care groups, pharmaceutical companies, truckers, bankers, the securities industry, retailers and jewelers have thus joined with catalog showrooms in raising the alarm of the potential consequences of H.R. 1212. We join with the security and polygraph industries as end users to express this grave concern.

Customer theft of jewelry, drugs, etc. is one issue. However, with most losses, attributable to "in house" actions and with large losses going far beyond outside inventory, a crucial element in keepint total losses in balance is the existence of the possibility of the use of employment polygraph testing, and

we would stress that the potentiality of such testing in and of itself serves a very valuable function. Conversely, the elimination of the possibility of such testing, by itself, will have a negative impact on our society.

Furthermore, company investigations are essential to their continued operation in our economy, and polygraph is an extremely useful tool, which the Congress itself recognized when it encouraged its use for security purposes by the U.S. Defense Department in 1985.

Not only are all others connected with an enterprise well served by an efficient, honest operation that can continue to provide jobs and serve customers' needs, but even a potential thief may be well served if discouraged from taking a regrettable step.

It is access to polygraph, not the unreasonable use of polygraph that we support, as is the case of scores of responsible businesses who have joined to support a sound regulatory bill such as H.R. 1536, which will protect the rights of the employee, as well as preserve polygraph use for responsible business purposes.

There is nothing wrong with curbing abuse on the use of polygraph. To the extent that a law requires responsible users, we support that purpose.

It should be noted that many states have permitted the use of polygraph examinations as evidence in court cases, not only in the famous criminal cases but in civil matters as well.

H.R. 1536 provides for the states' right to regulate polygraph unless they fail to meet federal minimum mandated standards. Under this proposal no employment decision could be based on the refusal to take a polygraph examination, nor solely on the results of a polygraph examination.

Minimum qualifications and training standards would be established under H.R. 1536.

Employees would be given full notice of their rights, including receipt of a copy of the report, and waiver of rights would not be permitted under H.R. 1536.

We believe that any outright ban on the use of polygraph would have a major impact throughout our economy and our society which has not been fully considered, with great adverse effect on a variety of victims, far beyond the billions of dollars which could be directly lost annually by the business sector.

We respectfully request that the Committee and the Congress reject H.R. 1212, and adopt H.R. 1536 as the best alternative for the country.

Respectfully submitted,

Richard B. Kelly,
General Counsel NACSM
RBK/tv

NAMA. NATIONAL AUTOMATIC MERCHANDISING ASSOCIATION 20 N. WACKER DRIVE, CHICAGO, ILLINOIS 60606 (312) 346-0370

Serving the Vending / Foodservice management industry

EASTERN OFFICE
WESTERN OFFICE

April 23, 1987

APR 29 1987

The Honorable Pat Williams
Member of Congress
2457 Rayburn House Office Building
Washington, DC 20515

Re: H.R. 1212

Dear Congressman Williams:

N A M A is the national trade association of the merchandise vending machine industry and has as members over 2400 companies most of whom place and operate vending machines.

Because retailing by means of vending machines is essentially a cash business with a variety of employees having access to that cash during the cash flow from the vending machine, to the headquarters of the company, and finally to the bank, the opportunity for theft is ever present.

Although sophisticated product inventory and accounting controls provide adequate safeguards under normal conditions, there are inevitably times (specific incidents) when cash or product is short. Since, under most circumstances, a loss could be the result of wrongdoing by more than one employee with access to cash or product, many of our members have employed polygraph testing as a useful tool to separate the innocent from the guilty.

Under your bill, H.R. 1212 now being considered by the subcommittee on Employment Opportunity of the House Committee on Education and Labor such use of the polygraph would be prohibited. Such prohibition will negatively impact many of our members who use the polygraph in situations described above. Their experience shows no adverse effect on the industry's excellent employer-employee relations by such polygraph use. Employees welcome its use to remove the cloud of

suspicion and accusation of guilt.

We urge you to consider this view when crafting the final version of a bill regulating employer use of the polygraph. It would be appreciated if this letter may be made a part of the hearing record on this legislation.

Sincerely,

Richard W. Funk
Counsel

cc: Members of the Committee

STATEMENT

OF

NATIONAL GROCERS ASSOCIATION

ON H.R. 1212

EMPLOYEE POLYGRAPH PROTECTION ACT

SUBMITTED BY

THOMAS K. ZAUCHA

PRESIDENT AND CHIEF EXECUTIVE OFFICER

TO THE

HOUSE EDUCATION AND LABOR

EMPLOYMENT OPPORTUNITIES SUBCOMMITTEE

UNITED STATES HOUSE OF REPRESENTATIVES

APRIL 30, 1987

Introduction

The National Grocers Association (N.G.A.) takes this opportunity to submit the views and position of its retail grocers and food wholesaler members on H.R. 1212, the Employee Polygraph Protection Act. The National Grocers Association is the national trade association representing over 2,000 members of the small business sector of the food distribution industry. Retail and wholesale grocers hold full membership in N.G.A.; state/local associations and manufacturer/suppliers hold associate membership in N.G.A.

Retail grocery and food wholesaling businesses are characterized by a high dollar volume of inventory, and a high number of annual inventory turns. In 1986 food retailing had annual sales of over $305 billion in consumer products and an average industry net profit margin of approximately 1.7 percent.

In low profit, labor intensive industries, such as food retailing and wholesaling, the employee serves as a key component in assuring successful business operations. The employee must provide service of high productivity, efficiency and honesty. The consumer relies upon our employees to satisfy their needs and to protect the integrity and safety of the products which they purchase. N.G.A. members have historically enjoyed the very highest levels of respect and mutual cooperation with their workforces. The results have been successful economic operations produced by satisfied customers. Indeed, a recent Gallup Poll showed that supermarkets earned the highest ratings of customer satisfaction when compared to other services industries.

However, it is a fact of life that there are unfortunate incidents, involving internal theft, drug abuse, and other criminal acts, when an individual can do substantial harm to a company. It is just such incidents which have led retail grocers and food wholesalers to use the polygraph as part of an overall effort to promote employee honesty and protect the assets of their company.

As the debate on the proper use of polygraph tests in the private sector continues in the United States House of Representatives, food retailers and wholesalers oppose H.R. 1212's complete ban on private sector employers' right to use polygraph tests, and encourage Representatives to seek an appropriate balance between the rights of individuals and those of private sector employers. Perhaps this was best said by one of N.G.A.'s Nebraska retailers:

> "At a time when so many businesses are hard pressed to make a profit it becomes more important to have honest employees.
>
> We are in the retail grocery business and profits are very slim. We must guard against shoplifting as well as internal theft. One of the ways of guarding against internal theft is by giving prospective employees a polygraph test before hiring and at future periods through their employment. It is estimated that 50% of retailers' shrinkage comes from internal theft.
>
> The polygraph test results in hiring better quality employees and also makes for better morale because employees are working with honest people and if losses do occur the honest employee is exonerated.
>
> We realize polygraph tests are not perfect, but are one of the best tools available. We only wish to know the employees are honest, do not have a drug problem, or drinking problem.
>
> We use only licensed polygraphers and the rights of the individual are protected. We must not overlook the rights of honest individuals to work with honest and decent people. I urge you (Congress) to please not take away this tool of management to screen out the dishonest employees."

I. Present System

At the governmental level, polygraph and lie detector devices have received significant amounts of utilization. Both the state and federal governments have increased their reliance upon such devices in order to sceen out undesirable employees, as well as to investigate employee mis, mal, or nonfeasance. Countless governmental agencies at every level have expressed the explicit or implicit judgement that polygraph devices are an integral and valuable part of the overall security process, and that the results which they produce constitute a sound foundation for personnel and operational decisions on an ongoing basis.

At the private level, utilization of polygraph and lie detection devices assumes a similarly important role. The independent grocery industry constitutes an ideal model of the entire small business community. Its needs and concerns as well as its experiences are typical of a far larger constituency.

II. Grocery Distribution Industry

Food retailers and wholesalers employ millions of full-time and part-time employees to assure the efficient and safe distribution of food, drug, and other grocery related products to consumers. The industry handles a high dollar volume of consumer products, substantial amounts of cash and checks, and has a net profit margin of approximately 1 percent. Food retailers and wholesalers have a necessary business incentive to assure

the integrity and honesty of their work force. It is important to protect against internal theft of consumer products, drug theft, embezzlement, and other misappropriation of funds.

According to the Sparagowski report on "shrinkage" 65% of thefts from retail establishments are attributable to employee theft. Placed in the context of the fact that the retail industry alone suffers $10 billion in losses from employee theft every year the magnitude of the problem becomes compelling.

In an industry with an annual profit margin of approximately 1 to 2 percent, it is impossible for food retailers to absorb such losses and it unnecessarily adds to the cost of food. Estimates are that internal theft can increase consumer prices as much as fifteen percent.

The Drug Enforcement Administration reports that there are approximately 10,000 thefts of drugs and controlled substances each year. Fifteen percent of these drug related thefts are reported to come from employee theft. Food retailers frequently have pharmacies in their stores, and wholesalers frequently handle drug products as distributors.

Recent incidents of product tampering have increased public and inustry concern for assuring consumer safety in the consumption of food and drug products. The need to maintain the integrity and safety of America's

food system is significant national priority. Every legitimate method of deterrence and protection, including polygraph testing, must be utilized in preventing injury to consumers and businesses by criminal product tampering.

The polygraph test is a tool which food retailers and wholesalers may use in attempting to detect and determine individuals who are most likely to have engaged in criminal activity. It also affords an opportunity to absolve those who are innocent. Food retailers and wholesalers who use polygraphs do so in pre-employment screening to place employee candidates in jobs where they are most likely to be successful and minimize any temptation for criminal activity.

Perhaps the sentiments of individual food retailers and wholesalers best summarize the impact of H.R. 1212's complete ban on the use of polygraph tests. A Utah retail grocer states:

> "I believe as an employer I have the right to hire honest people. Honest employees allow me to keep retail food costs down.
>
> I believe other employees have a right to work in an honest environment, free from the suspicion of the wrongdoings of others.
>
> I feel I have a responsibility to keep drug problems out of my business. Anyone using controlled drugs poses a high risk to the safety and welfare of others as well as the business."

A Kansas food wholesaler writes on behalf of his company and the 760 retail supermarkets that he serves:

"The prohibition of the use of polygraph tests in screening potential and existing employees would deprive both retailers and wholesalers of an important and useful tool in investigating internal theft. The elimination of the use of lie detectors would encourage crime and raise food prices. The existing law is adequate to protect the employees from discriminatory or arbitrary acts of employers."

A retailer from Virginia operating six supermarkets and ten convenience stores has used the polygraph test since 1972 and states:

"This tool has proved to be invaluable in uncovering embezzlements, narcotic dealers as possible employees, etc.

I realize pressure is being placed on polygraph examinations but I feel the "Employee Polygraph Protection Act " is an 'overbroad prohibition'."

A Nebraska wholesaler expresses his concern and that of his 325 independent retailers regarding H.R. 1212:

"This is a most important means for us since polygraph tests are a useful tool for investigating internal theft which can be a major problem for retailers and wholesalers.

Clear minimum standards to protect both employers and employees are appropriate, but H.R. 1212 is an overbroad prohibition which interferes with the relationship between business managers and employees. As an alternative allow private employers to use polygraph tests but set appropriate standards for such tests and minimum qualifications for examiners."

The Retail Grocers Association of Florida stresses:

"A valued tool of our industry in the hiring process is a polygraph (lie detector) test. While we don't regard it as the sole answer to all potential employee security problems, it does have its place in the process by which we can assure we are hiring the best possible person for the job.

We believe that all reasonable methods should be allowed to help insure the most trustworthy are employed in Florida's supermarkets and convenience stores. The use of polygraphs in pre-employment screening is one such reasonable method."

III. Deficiencies of H.R. 1212

A. Double Standard

As written, H.R. 1212 permits the continued utilization, with virtually no substantial regulations, of polygraph testing in a variety of employment settings by governmental agencies at the federal, state, and local levels. At the very same time it imposes a virtual ban upon utilization of the same devices in similar settings and contexts by private employers. N.G.A. believes that such a blatant double standard is unwarranted and inconsistent public policy. Food retailers and wholesalers handling such important consumer products as food, drugs and related grocery products find it impossible to understand the rationale that would outlaw their ability to use polygraph tests, while approving its use by state and local governments. It is just as important to public health and safety to operate an honest and efficient food distribution system as it is to run honest and efficient governmental agencies. Polygraph tests are needed because the realities of business in this country dictate that theft, fraud and abuse be controlled. This need is just as important in the private sector as it is in the public sector.

Permitting polygraph tests to be used in the hiring and investigation of employees in state and local governments recognizes that the use of polygraph tests should not be prohibited. Polygraph testing in employment settings, be it pre-hiring interviews or internal investigations, can be an effective device when used properly. H.R. 1212 establishes a double standard - strongly supporting legislation to allow the government to conduct polygraph tests of prospective employees, while saying to private businesses that the results ofsuch testing are inaccurate and unfair and therefore cannot be used. The use of polygraph testing has a proper place in both government and private business when used within appropriate guidelines.

B. Federal Preemption

H.R. 1212 would preempt the legislative judgement of some 31 states, by prohibiting utilization of polygraph testing in ways and methods now accepted by these states. Of course, this degree of preemption is even greater in those states which have freely chosen not to regulate lie detector devices at all. To the extent that federal legislative involvement is deemed necessary, it would seem obviously more prudent and reflective of the balance of our federal system, for the national government to create and enforce common, minimum standards while permitting the states to construct more carefully calibrated and locally appropriate refinements on their own.

C. Employer and Customer Security

Passage of H.R. 1212 would seriously damage the interests of private citizens throughout the country. The ability of employers to operate their businesses in an economically profitable, managerial sound method would be seriously eroded by elimination of many of these tests. Certainly in areas such as independent retail and wholesale grocery operations which typify small business at its best, the economic margin of profit and loss--indeed, even of survival--may be a very small one. Fair and effective use of the polygraph can significantly assist small businesses to maximize the honesty and integrity of their workforce, thus reducing avoidable economic losses which otherwise can seriously threaten business welfare.

For employees, polygraph testing can actually increase workforce cohesion and compatability. Dishonest employees often fragment and divide employee unity. By reducing profitability and threatening business continuation, the dishonesty of the few can put at risk the job security of the many. If polygraph utilization has been freely negotiated as part of the bargaining process, and is thus acceptable to both employers and employees, there would seem to be little reason for the legislature to substitute its own judgement and prevent utilization.

For consumers, the polygraph and other lie detection devices when properly used, can offer important protections and advantages. By preserving employee integrity and workforce honesty, polygraphs help restrict costs from theft and insurance, thus assisting in holding consumer prices to a minimum level and retaining convenient service. At least as important, the actual or potential use of lie detection devices minimizes the threat of product tampering. Dangers to consumer safety are thus significantly reduced, a goal which should be an important consideration in any legislative judgement.

Recommendations and Conclusions

The National Grocers Association strongly believes that polygraph testing is a legitimate tool for pre-employment screeing and subsequent investigations of employee theft and product tampering. N.G.A. opposes any total prohibition upon private sector lie detection utilization as is proposed in H.R. 1212. The Association believes that any legislation in this area should be governed by the following principles:

(1) All polygraph or lie detection device regulation should apply equally to public and private employers alike. The concerns to employer, employee, and consumer are of significant magnitude in both areas that equivalent legal protections are warranted.

(2) Appropriate federal regulations should establish minimum standards in areas such as examiner certification, testing conduct, utilization of testing results, circumstances for testing, and relief from abuses. Uniform federal minimum standards would protect all parties from abuse while permitting state and local legislatures to exercise added controls within the federal system. A uniform base of regulation would also permit desirable additional controls when and where circumstances warranted.

(3) To the extent that specific cases for exemptions or modifications can be advanced, they should be assessed upon the basis of compelling particular circumstances.

Only by striking such a balanced approach can the rights of all United States citizens--employers, employees, and consumers--be best served.

04.30.87
TKZ/ljm

NMRI National Mass Retailing Institute

Richard I. Hersh
President

Headquarters: 570 Seventh Avenue, New York, N.Y. 10018 (212) 354-6600

Government Relations Office: 1901 Pennsylvania Avenue, N.W., Washington, D.C. 20006 (202) 861-0774

April 6, 1987

Honorable Matthew G. Martinez
Chairman
Subcommittee on Employment
Opportunities
Committee on Education and
Labor
Room 402
Cannon House Office Bldg.
Washington, D.C. 20515

Dear Chairman Martinez:

On behalf of the National Mass Retailing Institute (NMRI), let me respectfully request that the enclosed statement be made part of the record in the subcommittee's recent hearings on legislation prohibiting private employers' use of polygraphs or other lie detection tests.

NMRI is a trade association that represents over 100 major discount retail chains located in all 50 states. Its members' sales constitute a majority of the $120 billion dollar a year discount retail industry. NMRI also has over 400 associate members whose companies constitute an important part of the American business community.

NMRI strongly opposes eliminating a proven, effective tool in deterring and detecting employee misconduct. We urge that the subcommittee reject this legislation.

Sincerely,

Robert J. Verdisco
Vice President,
Government Relations

Enclosure

STATEMENT

OF THE

NATIONAL MASS RETAILING INSTITUTE

TO THE

SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES

COMMITTEE ON EDUCATION AND LABOR

ON

POLYGRAPH LEGISLATION

Submitted by:

ROBERT J. VERDISCO
VICE PRESIDENT,
GOVERNMENT RELATIONS

The National Mass Retailing Institute (NMRI) supports the continued ability of retail employers to choose, consistent with state law and sound practice, to use polygraphs as a part of their overall loss prevention programs. For that reason, NMRI opposes H.R. 1212, which would effectively ban private employer use of polygraph and other lie detection tests.

NMRI is a trade association that represents over 100 major discount retail chains located in all 50 states. Its members' sales constitute a majority of the $120 billion dollar a year discount retail industry. NMRI also has over 400 associate members whose companies constitute an important part of the American business community.

Not all NMRI members employ polygraphs, but many do, mostly commonly in investigating losses which are suspected of stemming from internal theft.

Although the legislation before the subcommittee does not appear to recognize the fact, employee theft is a very large and extremely serious problem for most employers; it is an area of special concern for retail companies.

While all businesses are vulnerable to internal theft, the type of stores operated by NMRI members encounter special challenges in preventing such losses. Primarily self-service, the stores employ large numbers of workers, and handle a high volume of primarily cash purchases; this affords a dishonest employee a multitude of opportunities to steal cash or merchandise.

Some NMRI members have special grounds for concern about a polygraph ban, due to particular merchandise lines where losses could be particularly damaging. Many operate pharmacies within their stores carrying prescription drugs. In the wrong hands, these valuable items are capable of great harm. Retailers with catalog showroom or jewelry stores must be concerned over the very serious damage they could sustain from losses in such areas as gems, precious metals, watches and other easily concealed, high value merchandise.

Our highly competitive industry's modest profit margins mean that any preventable loss will hit harder than it might in a less competitive industry better able to tolerate such losses. In addition, these losses may be passed on to all consumers in the form of higher prices. And a retail company unable to control its shrinkage faces a very bleak future.

Estimates vary on the prevalence and total economic loss from internal theft (a recent National Institute of Justice study found that one-third of the workers surveyed admitted to theft of company property).

In the Eighth Annual Survey of Security and Loss Prevention conducted for NMRI by Arthur Young & Company, figures for 1985 showed an overall 1.8% inventory shrinkage for the 113 mass merchants, department stores and specialty stores participating in the survey. This translates into nearly $1.3 billion in losses. While the exact breakdown of this loss is difficult to measure accurately, retailers participating in the survey attribute 42% -- by far the largest share of the loss -- to employee theft, compared with 31% attributed to customer shoplifting, 23% to inadequate paperwork controls and 4% to theft by suppliers.

No matter what the precise figures are, it is undeniable that internal theft constitutes a real, sizable problem that can threaten a retail company's very existence.

Employers have a legitimate right to protect themselves against such losses. The majority of states recognize that polygraphs can play a useful role in deterring crime and preventing economic losses. When judged necessary, these states have shown they are capable of regulating polygraph use to prevent objectionable practices while at the same time permitting controlled polygraph use. By adopting the legislation now before the subcommittee, Congress would disallow those measured and constructive state actions.

Uncontrolled internal losses can be the death warrant for a company. Depriving employers of an effective tool for controlling losses will only contribute to business failures and the needless loss of jobs.

The House of Representatives in the recent past has expanded the power of military agencies to use polygraphs to protect vital information and to deter criminal misconduct. It would be ironic and very unwise if, on the heels of that action, Congress removed private employers' ability to protect their cash and merchandise from internal theft, and eliminated one of their most effective tools in deterring and detecting employee misconduct.

NMRI strongly urges all members of Congress to reject the ill-considered proposal to ban private employers' polygraph use.

Save the dates...
NRMA's 77th ANNUAL CONVENTION & EXPOSITION
Sunday, January 10th—Wednesday January 13th, 1988
The New York Hilton & Sheraton Centre Hotels

National Retail Merchants Association

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ATTN: NRMA

1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
202/223-8250

STATEMENT OF

THE NATIONAL RETAIL MERCHANTS ASSOCIATION

REGARDING

H.R. 1212

THE EMPLOYEE POLYGRAPH PROTECTION ACT

BEFORE THE

EMPLOYMENT OPPORTUNITIES SUBCOMMITTEE

COMMITTEE ON EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

MARCH 1987

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INTRODUCTION

The following statement is submitted by the National Retail Merchants Association ("NRMA"), in response to legislation currently pending in the United States House of Representatives which seeks to abolish the use of polygraph examinations by private employers. NRMA is the nation's largest trade association representing the general merchandise retail industry. Our members operate more than 40,000 department, chain, specialty and independent stores in the United States and 1,000 stores in 50 nations abroad. Together, NRMA members employ 3.5 million individuals and have aggregate annual sales in excess of $175 billion.

NRMA submits this statement out of the concern of its members that Congress, in attempting to deal with certain perceived abuses arising out of the use of the polygraph, may overlook the legitimate and necessary function served by the polygraph in the retail industry. We believe, therefore, that before "throwing out the baby with the bathwater," Congress should look closely at the benefits currently provided to the public-at-large by the proper use of the polygraph, and at the likely adverse effects which would flow from a ban on the use of the polygraph by private employers.

The Polygraph Is A Necessary Tool of Business Today

The polygraph is used today in the retail industry for two primary purposes: (i) to reduce employee theft which raises the cost of goods and services to the consumer public and (ii) to reduce the risk of employment of criminal elements who may pose a danger to consumers.

Employee theft is a serious and widespread problem in America. The public suffers when the prices of goods and services are inflated due to losses attributable to employee theft. It has been estimated that American business loses $40 billion annually because of employee theft. In a recent National Institute of Justice

survey, one-third of the retail, manufacturing and service employees questioned admitted to stealing company property. Fireman's Fund Insurance Company has estimated that employee theft causes one-third of all business failures. Of course, the American consumer has to pay more for goods and services as a result of increased costs due to employee theft. A ban on the use of polygraphs by private employers thus would be felt by all of us.

Specific instances involving application of polygraph examinations within the retail industry will serve to illustrate its importance — both in reducing employee theft and in reducing risks to the public. One example is a large department store which inquired on its employment application whether the applicant had ever been convicted of a crime. The store hired an applicant for a television repairman position who had answered with a "no" the question concerning convictions. The repairman was dispatched to a house where two young children were at home. The repairman sexually molested both children. Later investigation revealed that he had prior convictions for sexual abuse. Some retail stores use the polygraph in selected cases to verify responses given to questions on their employment application, but unfortunately this particular store had not done so. Had the polygraph been used to verify the answers on this employee's application, the tragedy for these two children likely would have been avoided. A legislative prohibition upon the use of polygraphs as screening devices would increase the risk of similar tragedies.

At another large retailer, polygraph examinations are given only to applicants for positions in its trucking and warehousing operations. When the examinations were initiated, 50 percent of the applicants failed the exam. (The failure rate has been reduced to 33 percent, presumably because the company's use of the polygraph as a screening device has become widely known.) What is especially significant here are the two most frequent reasons for applicant washout as revealed by the polygraph examinations administered by this retailer. The most frequent basis for

rejection was that the polygraph revealed the applicant engaged in theft, undetected at the time, at a prior employer. The next most frequent basis for rejection of an applicant as revealed by the polygraph examinations was regular, on-the-job use or sale of illegal drugs. One of the reasons for asking applicants about drug use was the company's high accident rate in its trucking operations, and the concern that many accidents were caused by drivers with impaired faculties.

Polygraph examinations are a valuable tool not only in screening applicants for employment in the retail industry, but are highly useful in investigating internal theft. Frequently employees themselves suggest they undergo polygraphing to remove themselves from suspicion, and employees often are exonerated through use of the polygraph. For example, at one large department store, three employees who worked in the cashier's office were suspected of stealing. Polygraphs cleared all three of suspicion. In another large department store, $30,000 of jewelry was discovered to be missing. The two employees who had direct access to the jewelry undertook polygraph examinations and likewise were cleared. And in yet another department store, security cases were found unlocked one morning and merchandise stolen. Suspecting an inside job, the company gave polygraph examinations to two janitors, the only employees present in the store at night. The examinations, which were administered to the two Spanish-speaking employees by a Spanish-speaking polygrapher, removed the employees from suspicion.

In many investigations of internal theft, polygraph examinations are used solely to verify information obtained through other sources. For example, faced with vast internal losses, one company conducted an undercover operation which brought to light a ring of thieves composed of dozens of employees. Polygraph examinations were administered to employees who had confessed so as to confirm the veracity of the confessions and ascertain the true loss caused by employee theft. In this instance, polygraphs were not used to identify the participants in the theft ring.

The Alleged Abuses of the Polygraph

Notwithstanding these compelling reasons for permitting private employers to continue to make appropriate use of polygraph examinations, there are still cries to abolish the use of the polygraph in American industry. The argument for doing so is most frequently based on perceived abuses in the use of polygraph examinations. Thus, it is frequently claimed that employees are questioned about their political affiliations, union activities, or religious beliefs. The proposed ban on the use of polygraph examinations clearly goes far beyond what is necessary to deal with such abuses, be they real or imagined. Indeed, existing legislation already is in place to deal with many such claimed abuses. For example, it is not necessary to ban the use of the polygraph to prevent inquiries about an employee's union sympathies. An adequate remedy already exists under Section 8(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1), which makes it unlawful for an employer to interrogate an employee for this purpose. In fact, the NLRB has found employers to have violated the NLRA where polygraphs were utilized to determine which employees were union adherants. Similarly, inquiries concerning religious affiliations run afoul of federal and state anti-discrimination laws.

Those who seek to ban the use of the polygraph also frequently complain about the failure of the company and/or the polygrapher to explain the polygraph procedure to the person being examined. Even if this were a pervasive practice, it should not be cause to totally ban the use of polygraphs. Rather, stricter regulations governing the use of the polygraph would control the absues while preserving the polygraph as a legitimate and effective weapon to combat employee theft or other criminal activity.

It is also argued by some that polygraphs are not sufficiently accurate to permit their use by private employers. Advocates of a ban on the use of polygraphs in employment cite the fact that polygraph results are inadmissible in criminal

trials. But this argument ignores the fact that in our criminal law system, conviction requires proof beyond a reasonable doubt. This is a much higher standard of proof than we apply even in civil litigation, let alone when we are dealing with discretionary decisions such as whether to hire a candidate for employment. Should retail employers need proof beyond a reasonable doubt before they choose not to hire a person who they have reason to believe is a drug dealer or a child molester? By forbidding the use of polygraphs, the Williams bill would force private employers to rely on more subjective criteria in hiring, reversing the direction toward the use of objective criteria taken by Congress in enacting the various anti-discrimination statutes. And the innocent who currently are absolved of wrongdoing by polygraphs would be compelled to dwell under a cloud of suspicion.

Exemptions to the Anti-Polygraph Bills Illustrate the Usefulness of Polygraphs

The exemption within the Williams bill for all governmental agencies undermines the contention that polygraph examinations should be banned because of their alleged inaccuracy. By an overwhelming vote, the House already has rejected the inaccuracy claim. On June 26, 1985, the House passed, by a vote of 333 to 71, a bill sponsored by Representatives Bill Young of Florida and William Dickinson of Alabama to amend the Department of Defense Authorization of 1986 so as to allow the Department of Defense to increase its use of polygraphs as a method of screening personnel with access to sensitive information. By this action, the House apparently overwhelmingly acknowledged the usefulness of the polygraph in protecting our national security. Yet, the same interests which make the polygraph a useful tool for protecting against theft of information make it a useful tool for protecting against theft of cash and merchandise.

Much of the evidence adduced during consideration of the Dickinson-Young amendment supports NRMA's view that the polygraph is extremely useful in investigating internal theft and screening employee candidates. John McMahon,

Deputy Director of the CIA, stated in a letter to the House that "the polygraph is the most effective tool we have to identify and screen out individuals whose employment or affiliation could jeopardize our national security." Other individuals involved with national security were quoted as stating that the polygraph is an extremely useful tool. The effectiveness of the polygraph in the private sector was indicated by Representative Young who referred to a letter from the head of security for Days Inns, a motel chain, in which the writer stated that annual losses from employee theft were reduced from over $1 million to about $100,000 during the first year that polygraphs were used.

NRMA's Position

It is NRMA's position that the benefits of polygraph use in the private sector are no less and the risks no greater than in the government. If abuses in the administration of polygraph examinations are shown, then Congress should address those abuses with remedial legislation such as standards for accreditation of polygraphers. An outright ban on the use of polygraph examinations by the private sector simply is not warranted, and conflicts with the policy considerations favoring its continued use in the public sector.

In sum, NRMA proposes that the Committee reject the Williams bill, and any other proposed legislation which seeks to outlaw legitimate uses of the polygraph. Rejection of such proposed legislation would better serve the interests of the public-at-large by protecting the honest employee and the consumer.

NTDRA
NATIONAL TIRE DEALERS & RETREADERS ASSOCIATION, INC.
Suite 400, 1250 "I" Street, N.W., Washington, D.C. 20005-3989 (202) 789-2300 (800) 368-5757

COMMENTS OF

DONALD T. WILSON

DIRECTOR, GOVERNMENT RELATIONS

NATIONAL TIRE DEALERS AND RETREADERS ASSOCIATION, INC.

concerning

H.R. 1212 - EMPLOYEE POLYGRAPH PROTECTION ACT

Submitted to the

SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES

COMMITTEE ON EDUCATION AND LABOR

UNITED STATES HOUSE OF REPRESENTATIVES

March 5, 1987

President E.R. BROWN; *President Elect* DON PERRY; *1st Vice President* JOE DePAOLIS; *2nd Vice President* JOHN SHIMER; *Treasurer* JERRY BAUER; *Corporate Secretary* MARSHALL HAMILTON; *Executive Vice President* PHILIP P. FRIEDLANDER, JR.

March 5, 1987

Mr. Chairman:

My name is Donald Wilson. I am Director of Government Relations for the National Tire Dealers and Retreaders Association (NTDRA), a national non-profit trade association representing over 5,000 independent tire dealers and retreaders in all 50 states. NTDRA's members are engaged in the wholesale and retail distribution of automobile and truck tires, the retreading of tires, and the sale of automotive aftermarket services and related products.

I appreciate this opportunity to comment on behalf of NTDRA and its membership in opposition to H.R. 1212, the Employee Polygraph Protection Act. We commend you Mr. Chairman for convening hearings on this important legislation. Hopefully, as a result of this hearing, members of this subcommittee will have a better understanding of why it is important that private employers not be denied the opportunity to use polygraphs as one tool in the difficult task of screening prospective employees and in investigating employee misconduct.

Mr. Chairman, employee theft is a very serious problem throughout the business community. Various studies conducted for retailing groups such as the American Retail Federation and the National Association of Chain Drug Stores indicate that employee theft may add as much as 15% to the cost of consumer goods. Resulting losses in the retailing industry are estimated annually to be in the billions. Inventory losses are increasing and there is evidence that employee theft may be the leading cause.

Increasingly in recent years, some retailers have turned to the use of polygraphs to assist in the screening of prospective employees in an effort to reduce inventory losses due to employee theft. For many retailers more careful preemployment screening, including the use of a polygraphs, has produced measurable results.

It may also have produced abuses. In response to charges of abuse, an increasing number of states have moved to regulate the administering of polygraph tests. In light of responsive and responsible state action in this area there appears to be no compelling reason for a federal presence.

Supporters of this legislation argue forcefully that polygraphs are unreliable and therefore should be banned. They argue that the use of polygraphs constitute an impermissible invasion of an individual's rights.

This association does not have the expertise to attest to the reliabilty or lack of reliability of the polygraph. However, law enforcement agencies, the Department of Defense,

the CIA etc., have relied on the polygraph for years as a useful tool in their investigative and law enforcement efforts. Various studies have been conducted on the reliability of polygraphs and the results apparently range anywhere from 60% to 95% accurate. Is that accurate enough? Perhaps and perhaps not.

One thing for certain. The proponents of this legislation believe the polygraph is sufficiently reliable to justify its use by public sector employers, but not reliable enough to justify its use by private sector employers. This incredible and wholly unjustifiable double standard should on its face be repugnant to this subcommittee and indeed all members of Congress. The Employee Polygraph Protection Act, H.R. 1212, only offers its "protection" to employees in the private sector.

It would appear that proponents of this legislation are unwilling to put at risk the national security with their legislation but they are apparently perfectly willing to put at risk the economic security of the business community. They are unwilling to put at risk public monies but they are willing to put at risk the livelihood of the small entrepreneur.

If the votes in the House during the 99th Congress are any indication the discrimination inherent in this legislation will not be simply between private and public employers and private and public employees. On the contrary, there is every likelihood that discrimination will also exist between private sector employees. Are we to see again legislation that denies its "protection," to prospective employees of child care centers and nursing homes while extending "protection" to prospective employees of retail tire stores, retreading plants, and auto service facilities? How does one decide that one prospective employee is entitled to greater "protection" than another?

Mr. Chairman, the need for this legislation is suspect. The potential mischief it may do is virtually unlimited. Small businesses in particular may be harmed because they can least afford the economic losses this legislation may cause.

For employers in retailing and wholesaling concern is not simply with inventory losses. In many jurisdictions employers can be held liable under certain circumstances for the conduct of their employees. Surely an employer has the right to take all reasonable steps during preemployment screening to protect himself or herself from potential liability or from a job applicant with a past criminal record.

NTDRA does not oppose reasonable regulations governing the administration of polygraph tests. Individual states have and are taking steps to prevent the likelihood of abuses. We seriously question the need for Federal intervention in an area in which state legislatures are fully competent to deal with any problems or abuses which may arise. However, if

members of Congess believe a federal presence is imperative in this area, we urge this commttee to give consideration to various proposals which have been offered which would provide guidelines for the administering of polygraph tests rather than the ban on private sector use of polygraphs as mandated by H.R. 1212.

Mr. Chairman, from the parochial point of view of the retailer, wholesaler, and manufacturer inventory losses, potential liability problems, and the economic viability of their business are of paramount concern. This committee, however, must obviously concern itself with individual rights. And perhaps it is in this area that H.R. 1212 is so tragically flawed. It seeks to subordinate the rights of an employer to the rights of the employee. It seeks to provide "protections" to private sector employees that it will not extend to public sector employees. It does not extend the protection of the law equally and for that reason alone, it deserves to be defeated.

Again Mr. Chairman we thank you for the opportunity to share with you and the members of this subcommittee the views of NTDRA and its membership on this important legislation.

Statement of the

National Wholesale Druggists' Association

NWDA Testimony Before the

House Committee on Education and Labor
Subcommittee on Employment Opportunities

March 25, 1987

National Wholesale Druggists' Association
105 Oronoco Street • Alexandria Virginia • 703/684-6400
Mailing Address: P.O. Box 238 • Alexandria, VA 22313

Mr. Chairman and Members of the Subcommittee,

The "Polygraph Protection Act of 1987," H.R.1212, does not protect drug-free employees who must work side by side with employees who abuse drugs. This bill will, in our opinion, facilitate the entry of drug abusers into our distribution centers. Once they are in our distribution centers, the bill will help them steal and divert narcotics and other controlled substances without detection.

The key to reducing theft and diversion of narcotics and other controlled substances from drug wholesalers is thorough screening and background checks on potential employees who may have access to controlled substances. Polygraph plays a vital role.

The Polygraph Reform Act of 1987 (H.R.1536) provides for regulation of polygraph examinations in the workplace. The bill recognizes the need to permit the use of polygraph examinations. However, the bill also recognizes the need to protect employees from abusive use of polygraphs. It creates strict, minimum federal standards for the use of polygraph examinations by employers, and for how and by whom those examinations may be conducted. The bill's major provisions include the following:

. Unless the examination is given in accordance with minimum federal standards, the bill would bar employer use of polygraphs.

. No employment decision could be based on the refusal of an employee or prospective employee to take a polygraph examination.

. Employers would be barred from making employment decisions solely on the basis of the results of a polygraph examination.

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. Minimum qualifications and training standards would be established for polygraph examiners. The examiners would be barred from inquiring into religious, racial, political, or labor union beliefs or affiliations.

. Employees subjected to polygraph examinations would be given notice of their rights before the examination, and would receive a copy of the examiner's report.

. Unauthorized disclosure of information obtained during a polygraph examination would be prohibited, except to the employer, other polygraph consultants, or if legally compelled.

. Waiver of any rights by the employee under the act would not be permitted.

Rather than banning polygraph examinations, we hope this Subcommittee will consider enacting legislation that establishes standards and protections in the administration of polygraph examinations.

INTRODUCTION

The National Wholesale Druggists' Association (NWDA) is the national trade association of full-service drug wholesalers. It represents more than 90 percent of the drug wholesale industry by dollar volume. Its active membership is comprised of 86 U.S. drug wholesale corporations which operate more than 310 drug distribution centers nationwide.

Through these distribution centers, billions of dollars of controlled substances; i.e. narcotics, barbituates and other drugs of potential abuse, are distributed annually to drug stores, hospitals and medical facilities nationwide.

Most pharmaceuticals in the United States are distributed through drug wholesalers. An estimated 90 percent of all controlled substances, including dangerous narcotics, pass through drug wholesalers. Of the $14.3 billion of wholesale sales for 1985, it is estimated that $10.8 billion was in pharmaceutical products, $1.7 billion in proprietary products, $850 million in toiletries and $840 million in sundry and miscellaneous goods.

This huge distribution network stretches across the United States, with drug wholesalers physically located in all but two states. Wholesalers purchase goods and store them in close proximity to the community and hospital pharmacy customer. They perform a sorting function by concentrating, then dispersing goods in economic quantities and transporting them to pharmacies.

Drug wholesalers provide other marketing functions, including financing in the form of trade credit and value-added services. Among the value-added services provided by drug wholesalers are price and shelf stickers, product movement reports, electronic order-entry, retail accounting services and pharmacy computer systems. Wholesalers usually offer daily ordering and delivery services.

The wholesaler's largest customer is the independent retail pharmacy. The independent retail pharmacies represent more than 50 percent of the customer base. Nearly 23 percent of drug wholesalers' sales are to chain drug stores, 19 percent to hospitals. The balance is divided among chain drug warehouses, clinics, nursing homes, mass merchandisers, and food stores.

On average in 1985, a drug wholesaler's operating expenses were a lean 6.17 percent of net sales, with gross margins of 8.57 percent and net margins a scant 1.18 percent. At this profit margin, a drug wholesaler must sell $8,474 in merchandise to recoup the loss of $100 in stolen controlled substances.

Based on a 1985 survey, NWDA found that 80 percent of its members use polygraph examinations. The 20 percent who do not employ polygraph examinations are primarily located in lightly-populated rural areas where family-run businesses and close community ties preclude the need for polygraphs.

DRUG ABUSE HARMS THE WORKPLACE

According to a 1982 survey (the most recent available) by the National Institute on Drug Abuse (NIDA), 21 million Americans used prescription drugs for nonmedical purposes during 1982. This survey also estimates that nearly 25 million Americans experimented with illicit drugs during the same period.

According to DEA's Drug Abuse Warning Network (DAWN) statistics, the most heavily abused drugs are of legitimate origin. Of the top 20 drugs most frequently mentioned for 1980 through 1983, 15 were of a type normally found in the licit market; i.e. in drug wholesale warehouses, pharmacies and hospitals. These 15 drugs accounted for approximately 350,000 drug-related injuries and deaths from January 1980 to January 1982, while illicit drugs, such as heroin and cocaine, accounted for another 150,000 drug deaths and injuries. In terms of injuries and deaths, DAWN statistics clearly indicate that abuse of drugs of legitimate origin is at least equivalent to those of an illicit nature.

Mr. Ronald W. Buzzeo, deputy director for the Office of Diversion Control, Drug Enforcement Administration, discussed a report of drug abuse in the workplace /1/ at a meeting of the Institute of Nuclear Materials Management.

/1/ "Drug Abuse in The Workplace Employment Screening Techniques", International Drug Report, June, 1985

In that report, he noted that as many as 6 million workers in the United States abuse drugs on a regular basis. He said that other studies show that as many as 3 to 5 percent of the employees in any medium to large-sized plant may be dependent on drugs as a way of life. Experts have also established 19 to 36 years of age as the median age range of employees under the influence of drugs. These are frightening statistics considering that many of the individuals go undetected until they are involved in a total or tragic accident. According to Mr. Buzzeo, the drug dependency of these people contributes significantly to the $80 billion price tag paid by the American economy as a result of lost productivity, absenteeism, poor quality control, injuries, ineffective supervision, destruction of property and thefts. Compared with the nondrug user, a drug user:

* is a least three times as likely to be involved in an accident;
* has better than two times as many absences lasting eight days or longer;
* receives at least three times the average level of sick benefits;
* is at least five times as likely to file a workers' compensation claim;
* is at least seven times as likely to be the target of garnishment proceedings; and,
* functions at about 65 percent of his/her work potential.

Employees who abuse drugs adversely affect the public health and safety. Injuries, pain and death inflicted on the American public by those who abuse drugs in the workplace must be minimized.

The drug distribution warehouse with fast-moving conveyor belt systems, forklifts and pallet lifting devices is no place for someone whose senses are impaired by drugs. Such a person is a danger to himself and others.

DEA REPORTS EMPLOYEE THEFT OF CONTROLLED SUBSTANCES

In this country, any person or firm manufacturing, distributing or dispensing controlled substances, including dangerous narcotics, must register with the federal Drug Enforcement Administration (DEA) and comply with regulations to assure that controlled substances are not diverted from normal distribution channels. Among the literally thousands of controlled substances are amphetamines and barbiturates ("uppers and downers"), morphine derivatives and cocaine.

The regulations include specific, tight security measures. Despite these measures, employees still manage to circumvent the required controls.

For the period July 1982 through July 1983, total thefts reported to the DEA were 6,721. Nine percent were attributed to employee theft.

From January 1984 to March 1985, a total of 8,861 drug thefts were reported to DEA; 15 percent were attributed to employees. Thus, since 1983, the percentage of theft by employees has increased seven percentage points -- nearly doubling their involvement.

The DEA estimates that each year employees steal one million dosage units of controlled substances from pharmacies.

Drug wholesalers take very seriously their legal responsibility to keep dangerous drugs from being diverted for illegal purposes. We know that the controlled substances diverted from our warehouses will be used to feed the habits of those already addicted and to expose others to drugs, many of whom will be young people. As ethical drug wholesalers, it is our goal to assure that our employees will not commit drug security breaches.

WHAT DRUG WHOLESALERS DO TO MINIMIZE DRUG ABUSE AND DRUG DIVERSION

Drug wholesalers have found that the best way to provide a drug-free work environment and reduce diversion of controlled substances is to establish and implement standard employee screening procedures.

Among the measures used by most drug wholesalers are:

* extensive pre-employment interviews and written tests;
* thorough background checks with previous employers; and
* carefully supervised polygraphs by licensed examiners.

The Drug Enforcement Administration considers employee screening vital. Regulations state:

"1301.90 Employee screening procedures. /2/

It is the position of DEA that the obtaining of certain information by non-practioners is vital to fairly assess the likelihood of an employee committing a drug security breach. The need to know this information is a matter of business necessity, essential to overall controlled substance security. In this regard, it is believed that conviction of crimes and unauthorized use of controlled substances are activities that are proper subjects for inquiry. It is, therefore, assumed that the following questions will become a part of an employer's comprehensive employee screening program:

Question. Within the past five years, have you been convicted of a felony, or within the past two years, of any misdemeanor or are you presently charged with committing a criminal offense? (Do not include any traffic violations, juvenile offenses or military convictions, except by general court-martial.) If the answer is yes, furnish details of conviction, offense, location, date and sentence.

Question. In the past three years, have you ever knowingly used any narcotics, amphetamines or barbiturates, other than those prescribed to you by a physician? If the answer is yes, furnish details."

In a letter dated July 19, 1985, to NWDA, DEA has reaffirmed its position on the use of polygraph:

"It has been DEA's experience that extreme care is necessary on the part of drug firms, both in hiring and monitoring employees who have

routine access to controlled substances. These drugs command an illicit price which is many times their legitimate value, thereby creating an attractive temptation. The polygraph examination, utilized as one aspect of an employer's comprehensive employee screening, monitoring and investigatory programs for employees with routine access to controlled substances, has proven to be an effective means of determining criminal background, history of drug use and knowledge of or participation in the diversion of controlled substances. Information obtained as a result of the polygraph examination should be considered as but one part of an overall evaluation on the person's qualifications or continued employment.
DEA supports the use of the polygraph examination for pre-employment screening and as a subsequent investigatory tool in appropriate cases, provided that it is permitted by state and local laws. Those drug firms which utilize these procedures as part of their comprehensive program to minimize diversion are to be commended."

/2/ 21 Code of Federal Regulations 1301.90

HOW POLYGRAPH HELPS

The polygraph examination should be used as one phase of pre-employment screening and internal investigations. When used with other investigative measures previously mentioned, polygraph becomes a vital link in protecting our workplaces and in preventing drug diversion. Some examples may help.

1) A New England drug wholesaler reported that more than 430,000 doses of a very well-known tranquilizer had been stolen from its warehouse by several employees. The drug had been removed in small dosage units over a long period of time to prevent detection. Management eventually detected the loss but was unable to determine who was taking the drug. The state where the drug wholesaler is located has passed a law banning the use of polygraph by private industry. Although state police were exempted from the polygraph ban, their limited resources slowed the investigation. As a result, controlled substances continued to disappear. When finally administered, the polygraph exam detected a conspiracy including management, computer operations and warehousing.

Use of polygraph in pre-employment screening would probably have discovered that one of these guilty employees had lied on his application, as was determined during the investigation.

2) In another case, a salesman for a drug wholesaler was cleared of theft charges. A Georgia pharmacist claimed the salesman stole pills from several large pill bottles. In a verbal interview, the salesman denied the charge and volunteered to take a polygraph examination. The polygraph confirmed the salesman's innocence.

3) A third case, involving a Tennessee drug wholesaler, resulted in the termination of a truck driver who admitted stealing drugs because of pain from dental surgery. The driver first denied the allegations, then admitted taking the drugs when he failed a polygraph examination. He also revealed how he stole pills from so-called tamper-proof bottles. The packaging problem was reported to the manufacturer, who then took steps to prevent further pilferage.

4) A midwestern drug wholesaler reported that a total of $250,000 worth of prescription drugs were found to be missing during two annual inventories. The inventories indicated that small quantities of 20 drugs had been stolen over the two-year period. Management closely monitored their employees, but were unable to determine who was diverting the drugs; and, therefore, decided to polygraph all employees at the facility. The examinations indicated that a truck driver and dockman may have been responsible. Following the examination, the two employees admitted to conspiring to steal the drugs. Since that time, the drug wholesaler has experienced no thefts.

5) In another case, a polygraph examination helped determine that a manager had stolen $60,000 worth of drugs. A drug wholesaler was experiencing a consistent shortage of three drugs. They were sure that an employee was stealing but were unable to determine who it was. All employees having access to these drugs were polygraphed. The results of the polygraph indicated that a manager, who had the authority to authorize shortages, was stealing. Following the examination, the manager admitted to the theft.

6) A drug wholesaler found one quarter ounce of cocaine missing from inventory. A search of the facility's trash uncovered the box in which the cocaine had been shipped. This was a clear indication that the cocaine had been stolen by an employee. After a preliminary investigation, management was unable to determine who in the facility had stolen the drug. As a last resort, all employees were polygraphed. The polygraph of the eighteenth employee (out of twenty) indicated he may have stolen the cocaine. The employee then confessed. This employee was a relief-receiving clerk who worked three nights a week and was, therefore, one of the least likely suspects.

7) During 1984, one wholesaler administered more than 1,500 polygraph examinations to individuals applying for jobs in its drug distribution operations. About one in four applicants was not recommended for positions based on polygraph examinations in combination with other pre-employment screening tools. In 90 percent of the cases of those not recommended, the prospective employee admitted during the polygraph examination that he/she had lied on the employment application about a drug habit or criminal record.

8) During 1987, in Massachusetts, where polygraph examinations in the private sector are prohibited, one member conducted an investigation regarding theft of controlled substances. A former employee who had been fired for drug abuse took orders from two pharmacists for stolen drugs. The former employee had an existing full-case order-filler employee place drugs behind a plunger on a dumpster designed to crush and bail trash. After closing time, the two thieves retrieved the undamaged stolen merchandise from the dumpster. Our member eventually solved the case and obtained $10,000 recovery. Criminal convictions were obtained on possession of a class 6 narcotic. During interrogation of the full-case employee, the employee admitted to theft from prior employers, a condition that would have come out in his original pre-employment screening if the member had been able to use polygraph with applicants in the state.

9) In Michigan, where drug wholesalers cannot use polygraph, one member has added more than $34,000 in special cameras and other access control security hardware, and employed off-duty armed policemen for 16 hour surveillance daily. Unfortunately, the member has had to create a very oppressive work environment that undoubtedly is a security overkill for most employees in order to control those few who, given the slightest opportunity, would steal narcotics and dangerous drugs. This whole "Fort Knox" approach is not the way the member would like to run its business. However, due to the nature of the products the member feels it owes to the public at large to do everything possible to stop diversion(theft) of legitimate drugs into illegal channels.

10) Interestingly, in Pennsylvania, where there is an antipolygraph law, legitimate dispensers of drugs are exempt from the legislation. Consequently, drug wholesalers can and do polygraph applicants in Pennsylvania facilities. At one member's facility, it has been at least five years since any reported loss has necessitated an investigation. The member attributes no loss to its ability to screen out applicants who have a history (although usually not a public record) of theft from prior employers and/or current illegal use of drugs.

LICENSING REQUIREMENTS RATHER THAN POLYGRAPH BAN

Instead of banning this vital investigative tool now being used by the CIA, FBI, NSA and the Pentagon, we recommend that the Subcommittee establish standards and protections in the administration of polygraph examinations.

We support H.R.1536 which would prohibit polygraph examiners from inquiring into an individual's religious beliefs, racial background, political or labor affiliations or sexual preferences. These questions are not relevant to the workplace environment or the tendency to commit drug security violations.

Any individual who takes a polygraph examination should be provided a copy of the result if he/she requests. We agree that the examination results should have very limited disclosure.

Further, we support requiring the polygraph examiner to provide the written questions to the individual before the examination and to obtain in writing the consent of the individual to participate in the examination.

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SUMMARY

In summary, Mr. Chairman, H.R.1212 has been cited as the "Polygraph Protection Act of 1987." Ironically, it does not protect drug-free employees who must work side by side with employees who abuse drugs. H.R.1212 will, in our opinion, facilitate the entry of drug abusers into our distribution centers. Once they are in our distribution center, H.R.1212 will help them steal and divert narcotics and other controlled substances without detection. All of American society then suffers the terrible financial, physical and emotional harm caused by these diverted drugs as they feed addicts and expose others -- among them young people -- to drugs for the first time.

The key to reducing theft and diversion of narcotics and other controlled substances from drug wholesalers as well as all DEA registrants is thorough screening and background checks on potential employees who may have access to controlled substances. Polygraph plays a vital role.

We hope that Congress will acknowledge the vital role polygraph examinations can play in protecting American society from drug abusers and diverters as it already has acknowledged its importance for the FBI, CIA, and Armed Forces, as well as state and local governments.

A ban on polygraph examinations for our industry would undermine the Federal government's aggressive campaign against drug addiction and abuse.

Rather than ban polygraph examinations, we ask you to consider enacting the Polygraph Reform Act of 1987 (H.R.1536) which establishes standards and protections in the administration of polygraph examinations.

Thank you, Mr. Chairman, for this opportunity to state our concerns about such an important issue. We look forward to working with you and your subcommittee, as well as other members of the House to resolve this important issue.

NEW YORK CLEARING HOUSE

100 BROAD STREET, NEW YORK, N.Y. 10004

JOHN F. LEE
EXECUTIVE VICE PRESIDENT

March 13, 1987

Hon. Matthew Martinez
Chairman
Subcommittee on Employment Opportunities
Committee on Education and Labor
U.S. House of Representatives
Washington, DC 20515

Re: H.R. 1212

Dear Chairman Martinez:

The New York Clearing House Association, an association of twelve leading commercial banks* located in New York City, appreciates this opportunity to comment on H.R. 1212, which would prohibit the use of the polygraph by private employers.

We are deeply concerned about this legislation. The FBI reports that, in 1985, losses from fraud and embezzlement at banks, savings and loans, and credit unions totaled more than $841 million, and in 1986 totaled over $1.1 billion. Bank losses alone in 1985 totaled more than $794 million. Historically, better than 80% of these losses have been attributed to internal thefts (or illegal activities). These losses occurred at federally insured institutions. Yet, as FDIC Chairman William Seidman stated in a letter to the Senate Labor and Human Resources Committee last year urging an exemption from the bill for financial institutions, "[t]he primary responsibility for safeguarding the assets of the banking industry rests with the banks themselves."

In fulfillment of this responsibility, many of the member banks of the New York Clearing House Association use the polygraph in the course of internal investigations as well as in pre-employment interviews. Examinations are conducted by trained personnel in accordance with the highest professional standards.

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* The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Manufacturers Hanover Trust Company, Irving Trust Company, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA and European American Bank.

While we recognize that the polygraph has some limitations, we believe that it is an important tool in maintaining the integrity of the workplace and in investigating wrongdoing. For these reasons, we join Chairman Seidman in urging the Committee to exempt financial institutions from the reach of this legislation.

Unlike most other private sector industries, financial institutions are mandated -- by Federal law -- to establish a comprehensive security program. The Bank Protection Act of 1968 (12 U.S.C. 1881 et. seq.) directed each Federal banking supervisory agency to develop standards for bank security systems. The Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Federal Home Loan Bank Board have all promulgated regulations to ensure security at the institutions for which they have oversight responsibility. (12 C.F.R. 216, 21, 326, and 563a (1985), respectively.) Their concern for bank security is illustrated by the requirement that the Board of Directors of each bank directly appoint and supervise the bank's chief security officer.

Federal requirements respecting the security of financial institutions extend both to hiring requirements as well as to the maintenance of internal security. For example, under Section 19 of the Federal Deposit Insurance Act, banks holding federally insured deposits may not employ -- in any capacity -- any person convicted of "any criminal offense involving dishonesty or a breach of trust" without first obtaining the written approval of the FDIC. 12 U.S.C. 1829. Under Federal laws and regulations, commercial banks must investigate suspected thefts, embezzlement, and defalcations involving bank funds or personnel, certain mysterious disappearances or unexplained shortages of bank funds, securities, or assets, and any suspected violation of state or Federal law involving bank affairs. Details of such events must be reported to the Federal Reserve, Comptroller of the Currency, or the FDIC. Reports must also be made to the FBI and other law enforcement agencies. (12 C.F.R. 216, 7, 21, and 353 (1985), respectively.)

Similar duties are imposed by banking regulators in many states. Reports of losses and investigative reports are generally required to be filed promptly with state regulators. For example, the State of New York requires the filing of a report immediately upon the discovery of events involving the taking, or attempted taking, of money or property. (N.Y. Banking Superintendent's Regulations Sec. 300.1)

The banks do not shrink from these responsibilities. Maintenance of the public's trust in financial institutions compels the prompt investigation and rapid resolution of any wrongful acts that may interfere with the institutions' ability to safeguard their customers' property. Failure to control these acts leads to the erosion of the public's confidence in the ability of financial

institutions to ensure the safe and efficient flow of funds and to safeguard the dollars, securities, and other valuables entrusted to them. But if the banks are to do this job effectively -- a job that Congress and the regulatory agencies have directed them to do - then they must be able to use all appropriate tools in pursuing that task, including the polygraph.

The legislation before the Committee already provides an exemption for government workers, and the bill that passed the House last year exempted several industries -- among them, the security guard industry. In agreeing to that amendment last year, Mr. Williams -- as the author of the legislation -- took note of the important role played by security guards in protecting life and property, including "negotiable securities." Cong. Rec., daily ed., March 12, 1986 (H 1061). Mr. Williams also noted that the determination had been made "to establish symmetry between what we allow in the public sector in the way of polygraphing and what we allow in the private sector." Id. Surely the logic of this argument urges that financial institutions be allowed use of the polygraph. As Chairman Seidman argued last year:

> Federal law enforcement resources are not sufficient to investigate promptly every case of internal theft in the banking industry. Therefore, in order to minimize losses, banks, particularly the major ones, should have the internal capability to investigate employee thefts. The polygraph is an important investigative tool that may detect dishonest activity, as well as serve as a deterrant to dishonest behavior.

Prohibiting banks from using the polygraph at a time when the scope of criminal activity is broadening would significantly limit our ability to maintain security. To address this problem it is not sufficient only to permit the polygraphing of security guards. Crimes unknown before the advent of sophisticated telecommunications are a source of significant and growing losses, including unauthorized electronic funds transfers and the fraudulent use of automated teller machines. Millions of dollars can be diverted in an instant if the confidentiality of computer codes is compromised. Moreover, as noted in the "Report on the Study of EDP-Related Fraud in Banking and Insurance Industries (1984)," prepared by the American Institute of Certified Public Accountants, sensitive and confidential customer information stored in electronic data bases can be tampered with by dishonest employees with no trace of such activity. When added to the more "traditional" acts of dishonesty, such as credit card fraud, the manipulation of customer records, and the forgery and alteration of checks and securities, the potential for employee fraud is great. Losses from these activities account for the overwhelming majority of bank losses, and security guards offer little to no protection against such problems.

Congress has recognized the nation's financial institutions as the backbone of America's economic system. If these institutions are to fulfill their responsibility to maintain the security of the system, they must be permitted to use every effective, appropriate means of investigating wrongdoing by their employees, and they must be allowed to use similar means to guard against the employment of persons who present a risk to the security of the institutions. We have found the polygraph to be an effective tool in investigating and deterring wrongdoing, and we have used the polygraph cautiously and responsibly. Whatever the merits may be of limiting use of the polygraph by private employers generally, we believe that it would be ill-advised, and bad public policy, to deny financial institutions continued use of the polygraph. For these reasons, we urge the Committee to exempt financial institutions from the reach of this legislation.

We thank you for this opportunity to present our views, and look forward to working with you in the future.

Very truly yours,

MAY 04 1987

R W D S U

LENORE MILLER *President*
GUY DICKINSON *Secretary-Treasurer*

RETAIL, WHOLESALE AND DEPARTMENT STORE UNION • 30 E. 29th ST., NEW YORK, N.Y. 10016 • (212) 684-5300

April 7th
1 9 8 7

The Honorable Matthew Martinez
Chairman, Subcommittee on Employment Opportunities
518 House Annex Building I
Washington, D.C. 20515

Dear Chairman Martinez:

The Retail, Wholesale and Department Store Union is an International Union with approximately 180,0CO members. Our members work in occupations where they are potentially exposed to the use and abuse of the polygraph, the so-called "lie detector."

Consequently, on behalf of the union, I want to commend you and your subcommittee for holding hearings on the use by employers of polygraph testing.

At the RWDSU's most recent convention, we passed a resolution strongly urging Congress to promptly enact legislation which would protect private sector workers from the use and abuse of "lie detectors." We, therefore, support House Resolution 1212, introduced by Congressman Pat Williams and one hundred sixty-eight of his colleagues, a bill that would ban the use of the polygraph from the workplace.

Use of the polygraph violates the fundamental constitutional guarantee of privacy, and assaults basic workers' dignity. While the scientific research has consistently rejected the notion that honesty can be measured or that there is any physiological response indicative of truth or deception, more than two million polygraph exams were given last year.

Questions asked during lie detector tests often have little to do with subjects relating to employment but rather delve into personal matters such as sexual habits, religious and political beliefs and union involvement. The polygraph has ever been used for intentional race discrimination, and the evidence indicates it has resulted as well in unintentional race discrimination.

continued.....

The Honorable Matthew Martinez
Washington, D.C. 20515

April 7, 1987
Page Two

The use of lie detectors represents unfair employer intimidation and suggests an alarming trend toward the psychological manipulation of workers. State licensing of polygraph examiners offers no protection to workers but rather legitimizes the use of lie detectors, and has resulted in increased use and abuse of these devices.

Congress has, over the years, set limits on the conditions employers can impose on employees. Denial of employment by means of inaccurate, intrusive and intimidating pseudoscientific machines should not be tolerated at any time in any state or by any worker.

Congressman Williams' bill takes a great step toward eliminating the injustice caused by the use of polygraphs. I urge you to support the speedy passage of House Resolution 1212.

Sincerely yours,

Lenore Miller

LENORE MILLER
President

LM/afs

Boston University

Graduate School
195 Bay State Road
Boston, Massachusetts 02215

Center for Applied Social Science

April 3, 1987

Mr. Stephen J. Markman
Assistant Attorney General
Office of Legal Policy
Department of Justice
Washington, DC 20530

Dear Mr. Markman:

As the senior author of the 1983 Congressional Office of Technology Assessment report on the validity of polygraph testing, I read with great interest your March 5th statement prepared for the House Education and Labor Committee. I was, in particular, concerned with your description of the findings of the OTA report and your characterization of the scientific debate. I do not believe that you have described correctly the results of our study and the nature of the scientific debate.

Although the OTA report indicates that no simple judgement of polygraph test validity can be made, it is because no research validates its use. The report is very clear in indicating that neither theory nor data support the most common uses of polygraph tests. In addition, while Profs. Raskin and Lykken have a long-standing scientific disagreement about the polygraph, they agree on some fundamentals. Most importantly, they share a belief that polygraph tests should not be used in employment settings. Prof. Raskin, in fact, testified on behalf of this legislation when it was considered in the last Congress by the Senate Labor and Human Resources Committee.

There may be constitutional and political reasons that make it preferable for states to have control over such practices. I happen not to agree; the number of people whose lives have been destroyed by polygraph tests strongly suggests a need for a single statute. That's a more complex decision, however, than the scientific evidence which clearly point to unreliability and invalidity of the technology as used by employers. That both the American Psychology Association and the American Medical Association explicitly support HR1212 should tell something about the status of scientific views.

Thank you for consideration of my views.

Cordially,

Leonard Saxe, Ph. D.
Associate Professor of Psychology
Director

XC: Congressman Pat Williams

LS:dr

SECURITIES INDUSTRY ASSOCIATION

WASHINGTON OFFICE: 1850 M Street N.W. Washington D.C. 20036 (202) 296-9410

March 19, 1987

Hon. Matthew G. Martinez
Committee on Education & Labor
United States House of Representatives
2181 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Martinez:

Enclosed is the submission of the Securities Industry Association on H.R. 1212. We respectfully request that it be included in the record for the proceedings on March 5, 1987.

Financial institutions maintain consumers' most valued assets - their securities and deposits, and as we note in our testimony, the polygraph is an important tool in maintaining that security. In recognition of the importance of protecting consumers' securities and cash, Federal law requires broker/dealers to maintain the highest possible degree of security at their facilities. In light of this responsibility, and of the unique risks to which securities firms and other financial institutions are exposed, we urge the committee to exempt financial institutions from the reach of this legislation.

If you have any questions, please do not hesitate to call Jonathan Paret or myself at (202) 296-9410. Thank you for your consideration of this testimony.

Sincerely,

Donald J. Crawford
Senior Vice President and
Director of Government
Relations

DJC/mn
Enclosure
cc: Committee on Education and Labor

NEW YORK OFFICE: 120 Broadway, New York, N.Y. 10271 (212) 608-1500

The Securities Industry Association appreciates this opportunity to comment on H.R. 1212, which would ban use of the polygraph by private sector employers. The SIA represents more than 500 securities firms headquartered throughout North America. Collectively, these firms account for 90% of the securities business done in the United States and Canada.

During consideration of similar legislation in the Senate last year, Securities and Exchange Commission Chairman John Shad -- on behalf of the Commission -- argued for an exemption from this legislation for "those in the securities industry who have regular access to currency and negotiable securities." Mr. Shad noted that "[t]he sums involved aggregate in the trillions of dollars . . . " and that "[e]limination of the polygraph in these areas can be expected to increase insurance premiums, defalcations and other expenses ultimately borne by the investing public."

We share that concern. Indeed, the risks presented by this legislation go beyond the very real prospect of increased theft of currency and negotiable securities, and extend to unauthorized electronic funds transfers and the myriad problems that attend breaches of security. Our member firms serve as fiduciaries for literally billions of dollars of cash, checks, and securities. Employees have daily access to important confidential information. Protecting these assets demands that

securities firms be permitted to use all available technical means, provided that they are used responsibly and fairly.

While it is not unknown for individual thefts to total into the millions of dollars, it is worth noting that more than the profits of the securities firms is at stake here. The securities industry is regulated extensively by both government agencies and self-regulatory organizations that carry a mandate to protect the investing public and the nation's securities market. Section 15A of the Securities Exchange Act of 1934 requires that the rules of the various industry regulatory agencies, such as the New York Stock Exchange and the National Association of Securities Dealers, be "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade . . .and to protect investors and the public interest."

To this end, securities firms -- like other financial institutions -- are legally bound to high standards of accountability not required of other private sector industries. (See, e.g., SEC Rule 17f-2, which requires the fingerprinting of securities industry personnel as an aid in identifying persons with criminal records; Rule 345 of the NYSE, which requires Members to "make a thorough inquiry into the previous record and reputation of persons whom they contemplate employing;" Rule 346 of the NYSE, which prohibits Members from associating with any person "who is known, or in the exercise of reasonable care should be known, to be subject to any "statutory disqualifica-

tion"; and Rule 351 of the NYSE, which, among other things, requires the reporting of violations of laws or regulations to the Exchange.) The public interest in security at investment banking institutions and securities dealers is reflected in the fact that the Treasury Department is authorized to provide emergency loans of as much as $1 billion to the Securities Investor Protection Corporation, a non-profit corporation that protects customers of registered securities broker dealers.

The securities industry uses polygraph testing in pre-employment interviews for those who will have direct access to negotiable instruments, securities, or confidential information. We also use the polygraph in internal investigations of thefts, misappropriation of confidential information, and other wrongful acts, including the sending of false or unauthorized communications. These tests are not conducted arbitrarily or randomly. Indeed, the polygraph is reserved for the most serious investigations.

As an industry, our member firms are committed to preserving the privacy and civil rights of our employees and prospective employees. As we stated in testimony before the Senate Labor and Human Resources Committee last year, we are selective in our use of polygraph tests and follow careful guidelines when such tests are appropriate.

First, our member firms employ only experienced, reputable polygraph examiners.

Second, in both pre-employment interviews and internal investigations, the polygraph is never the sole determinant for making a decision, but is only a tool used in those processes. Other factors in the hiring process include a face-to-face interview, a written application, reference checks and an FBI report. Similarly, some of the measures taken to investigate wrongdoing include interviews, document research and accounting trails. The polygraph is used only if it is warranted by the circumstances.

Third, the tests are administered selectively. In pre-employment, only those who will have access to negotiable instruments, checks, securities and confidential information are tested. Most firms further limit polygraphs by never using the test as the first step in the hiring process. When used for investigatory purposes, the polygraph is used selectively and not on a dragnet basis.

Fourth, the questions asked during a polygraph exam are limited to the particular situation. In a pre-employment interview, the questions bear on the applicant's suitability for a sensitive job such as whether he or she has falsified employment application information, engaged in significant drug usage or thefts from previous employers. Similarly, in an internal investigation, the questions are limited to the facts of the incident being investigated. In neither case is the polygraph a "fishing expedition." Moreover, the industry does not ask questions concerning personal matters such as religious beliefs, political or union opinions, racial views and sexual preferences

and activities, and would not object to statutory safeguards along these lines.

Fifth, the tests are administered carefully and professionally. Before each examination, the polygrapher reviews the questions with the subject as well as any problems the subject might have in answering them. During the examination, the subject is asked the exact questions that were reviewed previously. If, during the test, there is an unusual reaction in answering a question, the test may be stopped and the examiner will attempt to clear up the matter. After the exam, an attempt is made to resolve problematic answers, including retesting if warranted.

Finally, we feel obligated to respond to the canard that polygraph examinations are reserved for low-level employees and are never used on white collar workers or supervisors. The fact of the matter is that managers and other white collar workers have been polygraphed where circumstances warranted such action, both in pre-employment interviews as well as in the course of investigations. The decision to polygraph an employee or prospective employee turns on the employee's access or anticipated access to negotiable instruments, currency, or securities -- not on the employee's rank. While it is true that more staff employees are polygraphed than managers, this is a function of the fact that there are more staff employees than managers in jobs that present the greatest opportunities for theft, not because of any arbitrary distinction between employees.

The industry does not claim that the polygraph is infallible, but only that it has proved to be an extremely valuable tool in verifying employment applications for positions of trust, and in the investigation of thefts and other wrongful acts. The polygraph is, or course, not the only means employed by the securities industry in pre-employment screening, and in the investigation of wrongdoing. The industry uses the full complement of investigative tools, including fingerprinting, interviews, and other recognized investigative methods. The polygraph is used with caution, but when it is used it provides important information that can corroborate testimonial or circumstantial evidence, or that can signal the need to do additional research work to resolve an investigation or to confirm job histories. For these reasons, we urge the Committee to amend this legislation to permit the continued, responsible use of polygraph testing by financial institutions, both in pre-employment interviews as well as in investigations.

As introduced, the legislation includes exemptions for government employees, and the legislation passed by the House last year included exemptions for security guards, employees of nursing homes and day care centers, employees of drug stores and drug manufacturers with access to controlled substances, and employees of public utilities. Each exemption resulted from balancing the private interests of employees and prospective employees against the public interest. We submit that the public interest in the security of financial institutions demands that

the securities industry be allowed continued use of the polygraph.

In this regard, we call your attention to the statement of Mr. Williams, author of the legislation, on agreeing to last year's amendment to exempt security guard firms from the bill:

> ...[T]he reason we are willing to accept this amendment is because it is very necessary, in the judgment of the sponsor of the amendment as it is to the sponsor of the legislation, to establish symmetry between what we allow in the public sector in the way of polygraphing and what we allow in the private sector.
>
> ...Security guards who guard our nuclear power plants, our hydroelectric facilities, our huge shipments of Code A drugs, our negotiable securities are guarding the health and safety of America, and we allow them to be polygraphed. Cong. Rec., daily ed., March 12, 1986, H1061 (emphasis supplied.)

That statement is no less true today than it was a year ago. Then, as now, concern over the theft of negotiable securities merits permitting the use of polygraph examinations by financial institutions. But it is insufficient to permit only guards to be polygraphed, since thefts can be achieved today in ways that can escape the purview of the most vigilant guard. Unauthorized electronic transactions present a growing and serious risk, and confidential information can be easily transmitted over the telephone. Most losses are not the result of robberies, but rather occur through the complicity and active involvement of a firm's own employees.

Permiting the polygraphing of security guards, therefore, is only a small beginning toward the goal of achieving real

security. If meaningful security is to be provided at financial institutions, more is needed; at a minimum, the institutions must be allowed to polygraph all employees who have or will have access to negotiable instruments, securities, currency, or confidential information, and use of the polygraph must be permitted as well in the investigation of thefts, misappropriation of confidential information, and other wrongful acts. Of course, this testing should be consistent with the technical and professional standards outlined above.[1]

We very much appreciate this opportunity to present our views, and look forward to the opportunity of working with the Committee in the development of this legislation.

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[1] While we have endeavored to enumerate the most serious security risks, we believe it would be ill-advised to limit an exemption arbitrarily to particular types of pre-employment or investigatory questioning. It would be difficult for example, to attempt to enumerate particular types of property, the theft or disappearance of which might justify the use of a polygraph as part of the internal investigation, especially where the theft or disappearance might be principally significant as evidence of a breakdown in the firms' system of internal controls. As is true in other areas of human affairs, a single act of dishonesty can have a debilitating effect on an organization that is out of all proportion to the value of what has been stolen.

SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO, CLC
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JOHN J. SWEENEY
INTERNATIONAL PRESIDENT

RICHARD W. CORDTZ
INTERNATIONAL SECRETARY TREASURER

STATEMENT

OF THE

SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC

BEFORE

SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES

COMMITTEE ON EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES

H.R. 1212
"THE EMPLOYEE POLYGRAPH PROTECTION ACT"
MARCH 12, 1987

STATEMENT OF
THE SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC
ON H.R. 1212, EMPLOYEE POLYGRAPH PROTECTION ACT

The Service Employees International Union has 850,000 members, about half of whom work in the private sector. SEIU locals have contracts in many industries where polygraph tests are routinely given to employees--building services, healthcare, hotels and restaurants, security firms, jewelry manufacturers and utilities, among others. Our members find these tests degrading and an invasion of privacy. At the same time, the scientific evidence finds no correlation between such testing practices and the prevalence of employee theft and other abuses. Based on this experience, we strongly support legislation to outlaw lie-detector tests from American workplaces.

More than two million Americans took lie-detector tests last year, the vast majority (98 percent) in the workplace. This is up five-fold from the 400,000 tests reported in 1979. More than 30 percent of the Fortune 500 companies and at least half of the banking and retail trade firms rely heavily on job tests. The frenzy of employer testing has rapidly spread to all parts of the fast-growing service sector, which accounts for roughly three out of four jobs.

Employers view polygraphs as an inexpensive way to protect against business theft when their employees handle large sums of money. Estimates of employee theft vary widely--ranging from $5-$50 billion. The U.S. Congress' Office of Technology Assessment estimates about $10 billion annually in business losses due to "internal crime" (which involves more than employee theft) in private industry. The American Management Association estimates that employee theft costs businesses $5-$10 billion a year.

Whatever the dollar total, polygraph testing has been shown to be a grossly

unreliable tool for controlling employee theft. Upon review of 30 field studies, the Office of Technology Assessment (OTA) concluded in their 1983 report, "Scientific Validity of Polygraph Testing" that, "There is little research or scientific evidence to establish polygraph test validity in screening situations..." Other studies show the lie-detector tests to be biased against truthful people. The more honest workers are, the more likely they will fail the test because of their heightened sensitivity to having their honesty challenged, or from fear of suspicion being misdirected at them. Dr. Leonard Saxe, the author of the OTA report, agrees that "because exceptionally honest and intelligent individuals may be highly reactive to questions about their truthfulness, such desirable employees will be misidentified at higher rates than other less desirable employees." The scientific studies find that between 36-54 percent of the innocent people who take the polygraph exam test as liars. Such margins of error are unacceptable in an employment context. Innocent workers who fail the test carry this stigma with them on their personnel records with destructive consequences for their careers.

Companies which use polygraphs on their employees are looking for a "quick fix". The problems which they hope to solve by polygraph testing could be addressed through less objectionable means which are more cost-beneficial to both employers and employees. Studies recommend a variety of solutions to reduce employee theft--intensive background checks, tight inventory control, fairness in employer-employee relations, ethical behavior by higher management, adequate communication, recognition of quality performance, and competent supervisors.

Not only are polygraphs ineffective, they are an invasion of workers' rights to privacy. OTA noted that employees and job applicants who have undergone polygraph examinations have been asked a host of non-job-related questions about family problems, sexual preferences, whether the employee has ever been tempted to steal, intended length of stay on the job, personal finances, drinking habits, political

beliefs, and marital relations. Such questions have nothing to do with cleaning a building, typing letters and other service occupations.

We strongly oppose any amendments to this bill which would provide exemptions for particular types of private sector employers. In the last Congress the Polygraph Protection Act of 1985 was amended to exempt private sector employers who claimed special needs for polygraph tests, such as drug manufacturers and distributors, various security services, public utilities, children's day care centers, and nursing homes.

The selection of these industries for exemption appeared to have been totally arbitrary. For instance, the polygraph test has no proper role to play in nursing homes. As a rule, nursing home workers don't even handle large amounts of cash or drugs. Instead, polygraphs have become vehicles for employee intimidation and for screening out employees who may join a union. There is simply no rationale for nursing homes to receive special dispensation from a polygraph ban. The same is true for security guards, of which we represent about 20,000 and who work mostly for security firms.

Collective bargaining provides some safeguards against polygraph testing. Building maintenance workers in San Jose, California faced a hard choice--submit to a polygraph or face discharge. Without our Local 77's grievance machinery, these employees would be in the unemployment lines. Local I-J in New York City won a landmark arbitration case against making jewelry workers take the unreliable polygraph tests in order to keep their jobs.

However, collective bargaining does not help the millions of unorganized service workers nor those who face pre-employment testing. The American Polygraph Association estimates that 75% of employment tests were given for such job screening purposes. Each year, 50,000 people are denied jobs because of polygraph tests.

SEIU regards H.R. 1212 as the first step towards the protection of all workers from polygraph tests. Public employees as well as private employees face these tests and should be protected from them also.

In short, the polygraph is a highly fallible and destructive device, whose removal from America's workplaces should be a top employment priority. Employees have the right to fair employment opportunities without coercion. Businesses that use the device do not really need to do so. Twenty-one states already ban or restrict the use of polygraphs in employment, and yet employers are still able to run profitable businesses and hire honest and capable employees in those states.

For these reasons, we strongly urge the quick passage of H.R. 1212 to ban the use of polygraph exams by private employers.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF
THE CHAIRMAN

April 28, 1987

APR 29 1987

The Honorable Matthew Martinez
Chairman
Subcommittee on Employment Opportunities
Committee on Education & Labor
House Annex I, Room 518
Washington, D.C. 20515

Dear Chairman Martinez:

The Securities and Exchange Commission wishes to express concern about the effect of H.R. 1212, the Employee Polygraph Protection Act, on the investing public and to suggest amending the legislation to permit limited polygraph testing in the securities industry for certain employees.

The Commission is aware of the considerations involved in the proposed ban on lie detector testing and is sensitive to the important personal privacy ramifications of polygraph testing. The Commission believes, however, that employees of the securities industry who have regular access to funds and negotiable securities or who control the movement of funds or securities through computers should be exempt.

The monies involved which would be protected by the proposed exemption aggregate in the trillions of dollars. Elimination of polygraph testing in these areas can be expected to increase insurance premiums, defalcations and other expenses ultimately borne by the investing public.

The views in this letter do not necessarily reflect the views of the Administration. Your consideration of this request and inclusion of this letter in the record of the Subcommittee's consideration of this bill would be appreciated.

Sincerely,

John Shad

March 5, 1987

Honorable Matthew G. Martinez, Chairman
Committee on Education and Labor
Employment Opportunities Subcommittee
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

On behalf of the Small Business Legislative Council (SBLC), I wish to have the following comments added to the record of the hearing on March 5 by your subcommittee on the subject of polygraph testing.

Once again you have before you legislation to ban the use of polygraphs by employers. We hope you will consider carefully the alternatives before drawing any conclusions regarding the efficacy of such legislation.

The Small Business Legislative Council (SBLC) is a permanent, independent coalition of ninety trade associations representing over four million small businesses. Our sole mission is to represent the interests of small business in national policy matters.

Polygraphs serve a useful purpose in our society and economy. We recognize that safeguards must be put into place to ensure proper use and administration of the polygraph. We also understand and value the rights of the individual and we stand ready to support efforts which will provide employees with the appropriate protection.

However, the health and safety of our employers and productivity are important to us as well. Employee theft, for example, is an unfortunate but significant problem for all businesses. Many employees never realize, particularly in a small business, that theft hurts everyone including their fellow employees. The margins in a small business are easily and dramatically effected by such activity and business failures have resulted from less significant activity than employee theft.

A small business depends on its employees, more than a bigger company may, for its success. Rare would be the small business who would relish the prospects of disrupting the employer/employee relationship by using a polygraph but the realities dictate a prudent and responsible security program and the use of polygraphs.

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The use of polygraphs is not and will not be universal. However, small business should have the opportunity and right to use the test. There are ways to protect the rights of the individual and provide a resource to the business owner. We hope we can work together to find the proper course. In that spirit, the SBLC passed the following recommendation on the subject of polygraph testing:

> POLYGRAPH LEGISLATION. The Small Business Legislative Council endorses federal legislation establishing minimum standards for the utilization of polygraphs in the workplace. Any such legislation must permit continued use of polygraphs for pre-employment screening, random testing, and incident specific testing. The administrative-regulatory requirements of legal compliance must be reasonable ones, and not so complex or expensive as to effectively preclude meaningful employment use. To the maximum extent possible, such legislation should treat all employers in an equal fashion and permit no substantive exemptions from its provisions.
>
> An alternative legislative approach of minimum legal standards should be developed. As part of its provisions, it should:
>
> a. Set professional standards for polygraph examiners.
>
> b. Prohibit certain categories of inquiry such as political, sexual, or religious oriented questions.
>
> c. Set limits on the proper use of exam results (e.g., tests could not be the sole reason for dismissal or failure to hire).
>
> d. Preempt less stringent state regulations.

We hope you will keep our views in mind as you consider this legislation. Thank you.

Sincerely,

John S. Sataga
President

JSS/cdp
Enclosure

Small Business Legislative Council®

Members of the Small Business Legislative Council

Alliance of Independent Store Owners and Professionals
American Association of Nurserymen
American Consulting Engineers Council
American Council of Independent Laboratories
American Dental Trade Association
American Electronics Association
American Machine Tool Distributors Association
American Society of Travel Agents, Inc.
American Sod Producers Association
American Subcontractors Association
American Textile Machinery Association
American Trucking Associations, Inc.
Architectural Precast Association
Association of Physical Fitness Centers
Association of Small Business Development Centers
The Association Group of Small Research Engineering & Technology Co.'s
Automotive Service Association
Automotive Warehouse Distributors Association
Building Service Contractors Association International
Business Advertising Council
Chicago Gift Show Inc.
Christian Booksellers Association
Dental Dealers of America, Inc.
Direct Selling Association
Electronic Representatives Association
Florists' Transworld Delivery Association
Helicopter Association International
Independent Bakers Association
Independent Bankers Association of America
Independent Insurance Agents of America, Inc.
Independent Medical Distributors Association
Independent Sewing Machine Dealers Association
Institute of Certified Business Counselors
International Association of Refrigerated Warehouses
International Bottled Water Association
International Communications Industries Association
International Franchise Association
International Reciprocal Trade Association

-more-

2 Sides

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Jewelers of America
Latin American Manufacturers Association
Machinery Dealers National Association
Manufacturers Agents National Association
Marking Device Association
Menswear Retailers of America
National Association for the Self-Employed
National Association of Aircraft and Communication Suppliers
National Association of Brick Distributors
National Association of Catalog Showroom Merchandisers
National Association of Chemical Distributors
National Association of Development Companies
National Association of Home Builders
National Association of Investment Companies
National Association of Manufacturing Opticians
National Association of Minority Contractors
National Association of Personnel Consultants
National Association of Plumbing-Heating-Cooling Contractors
National Association of Realtors
National Association of Retail Druggists
National Association of Small Business Investment Companies
National Association of the Remodeling Industry
National Association of Truck Stop Operators
National Association of Women Business Owners
National Candy Wholesalers Association
National Chimney Sweep Guild
National Coffee Service Association
National Council for Industrial Innovation
National Electrical Contractors Association
National Fastener Distributors Association
National Grocers Association
National Independent Dairy-Foods Association
National Moving and Storage Association
National Office Products Association
National Parking Association
National Precast Concrete Association
National Shoe Retailers Association
National Society of Public Accountants
National Tire Dealers & Retreaders Association
National Tooling and Machining Association
National Tour Association
National Venture Capital Association
Opticians Association of America
Petroleum Marketers Association
Printing Industries of America, Inc.
Retail Floorcovering Institute
Small Business Council of America, Inc.
Smaller Manufacturers Council
Society of American Florists
Specialty Advertising Association International
United Bus Owners of America
Urethane Foam Contractors Association
Web Sling Association

U.S. CHAMBER OF COMMERCE

Albert D. Bourland
Vice President
Congressional Relations

March 11, 1987

MAR 19

The Honorable Matthew G. Martinez
Chairman
Subcommittee on Employment
Opportunities
House Committee on Education and Labor
Washington, D.C. 20515

Dear Mr. Chairman:

The U.S. Chamber of Commerce, the world's largest federation of business companies, chambers of commerce and trade and professional associations, appreciates this opportunity to present its views on H.R. 1212, the Employee Polygraph Protection Act.

The Chamber opposes H.R. 1212, which would prohibit the use of polygraphs in the private sector.

At a time when on-the-job crime is increasing sharply, including theft, workplace drug abuse, industrial espionage, and employee crime against co-workers and the public, H.R. 1212 would ban one of the most effective tools available to employers to distinguish between innocent and guilty employees, to deter workplace crime, or to identify security risks among job applicants. Used responsibly, polygraphs are an asset to employers and employees alike.

Responsible use of polygraphs is a legitimate concern, a concern that should be and is being addressed by state regulation -- not federal prohibition. Thirty-four states and the District of Columbia now regulate the practices of polygraph examiners, and the number is growing. State licensing and guidelines for polygraphers are akin to state regulation of real estate brokers, doctors and lawyers. State licensing and guidelines already address at the state level the concerns that proponents of H.R. 1212 have articulated.

Employee theft raises the cost of goods to consumers by as much as 15 percent, and employee theft is growing. The Drug Enforcement Administration, which has endorsed the use of polygraphs in employee screening programs, estimates that one million doses of drugs are stolen each year from drug retailers, wholesalers and distributors. One employer, Days Inn of America, testified at a Congressional hearing during the 99th Congress that the use of polygraphs has helped reduce annual losses from more than $1 million to $115,000, and that more than $1 million in restitutions have been made by employees since the company instituted polygraph use in 1975.

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When the House of Representatives voted 333 to 71, in June of 1985, to support the expanded use of polygraph testing to maintain national security, an overwhelming majority of the House affirmed that polygraph testing is an effective, useful and reliable tool to deter espionage. If polygraphs are effective and reliable in maintaining national security, are they not as equally effective and reliable in the private sector?

In conclusion, the Chamber opposes H.R. 1212, which would prohibit the use of polygraphs in the workplace and which would ban a necessary tool in protecting millions of American consumers, as well as billions of dollars in company assets.

The Chamber respectfully requests that you include its remarks in the record of the hearings on this legislation.

Sincerely,

Albert D. Bourland

cc: Members of the Subcommittee
Eric L. Jensen, Staff Director
Mary Gardner, Minority Staff